



# THE ALL INDIA REPORTER

## 1919

*G. N. Das*  
Advocate High Court  
Jammu & Kashmir  
Srinagar.

LAHORE SECTION

CONTAINING

FULL REPORTS OF ALL REPORTABLE JUDGMENTS OF  
THE LAHORE HIGH COURT  
REPORTED IN

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*G. N. Dar*  
Advocate High Court  
Jammu & Kashmir  
Srinagar.

LAHORE HIGH COURT  
1919

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Chief Justices :

The Hon'ble Sir Henry Rattigan, Kt.  
" Mr. Johnstone.  
" H. Scott-Smith, (*Acting.*)

Puisne Judges :

The Hon'ble Mr. H. Scott-Smith.  
" Shadi Lal, M.A., B.C.L., Bar-at-Law.  
" W. A. Le Rossignol.  
" C. L. Dundas.  
" A. B. Broadway.  
" A. E. Martineau.  
" C. Bevan Petman.  
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*\* \* Indicate Cases of Very Great Importance.*

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4	1919 " 322	38	" " 228	73	" " 391	108	1920 " 351	141	" " 382
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3	" " 382	10	" " 199	17	" " 238	24	" " 375	30	" " 364
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N.B.—Column No. 1 denotes pages of other JOURNALS.

Column No. 2 denotes corresponding references of the ALL INDIA REPORTER.

### 1 Lahore Law Journal=All India Reporter

LLJ	AIR	LLJ	AIR	LLJ	AIR	LLJ	AIR	LLJ	AIR
1	1919 L 351	26	1919 L 425	44	1920 L 435	55	1919 L 190	69	1919 L 62
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87	not reportable	126	not reportable	168	" " 380	203	" " 40	230	1919 " 430
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101	1919 " 368	148	" " 207	188	" " 304	215	1920 " 56	245	" " 458
106	1920 " 409	150	" " 56	191	" " 333	220	1919 " 437	247	not reportable
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PLR	AIR	PLR	AIR	PLR	AIR	PLR	AIR	PLR	AIR
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3	1919 L 110	28	1918 PC 49	52	" " 92	76	not reportable	100	" " 336
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15	" " 418	40	" " 176	64	" " 272	88	" " 227	114	" " 374
16	" " 348	41	not reportable	65	" PC 11	89	" " 235	115	1920 " 315
17	not reportable	42	" "	66	not reportable	90	" " 390	116	" " 316
18	1919 L 136	43	1919 L 79	67	1919 L 350	91	1920 " 322	117	" " 400
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5	" " 90	28	" " 243	51	1920 " 517	74	" " 413	97	" " 193
6	" " 145	29	" " 138	52	1919 " 351	75	" " 429	98	" " 366
7	" " 859	30	" " 170	53	" " 418	76	1920 " 374	99	" " 20
8	" " 402	31	" " 349	54	" " 221	77	" " 373	100	" " 336
9	" " 208	32	" " 95	55	" " 231	78	" " 409	101	" " 154
10	" " 155	33	" " 157	56	" " 317	79	" " 435	102	1920 " 291
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15	" " 87	38	" " 276	61	1920 " 470	84	" " 42	107	" " 220
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18	" " 411	41	" " 181	64	" " 203	87	" " 32	110	1919 " 25
19	" " 104	42	" " 178	65	" " 364	88	" " 62	111	1920 " 18
20	" " 249	43	" " 272	66	" " 404	89	" " 6	112	1919 " 355
21	" " 217	44	" " 151	67	" " 207	90	" " 354	113	1920 " 79
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4	1919 L 433	10	" " 347	15	" " 284	20	" " 163	25	" " 367
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1	1919 L 470	141	1919 L 192	289	1919 P 111	421	1919 A 188	575	1919 A 35
2	1918 A 67	142	" P 407	299	" A 385	422	" M 226	576	" LB 55
3	1919 L 389	145a	" L 433	300	" C 142	425	" A 184	577a	" L 211
6	1918 A 60	145b	" M 353	302	" A 375	426	" N 89	577b	" P 350
7	" N 139	151	" C 155	303a	" L 128	429	" A 164	592	" L 433
8	" A 17	152	" L 300	303b	" A 374	431	" P 253	593	" PC 31
11	1919 L 472	154	" P 339	305	" L 184	432	" A 160	603	" P 362
12	1918 N 143	156	" M 316	309	" M 410	433	" B 103	607	1920 C 567
17	1919 C 884	157	" L 382	311	" A 110	436	" P 337	608	1919 A 389
19	1918 A 68	161	" P 27	313	" N 55	438	" B 36	609	" P 493
20	1919 C 1016	170	" C 203	315	" B 79	439	" P 330	610	" O 402
22	1918 A 65	172	" M 896	316a	" L 136	444	" P 290	612	" P 519
24	1919 C 696	174	" A 207	316b	" B 158	445	" N 98	615	" A 46
30a	" L 399	175	" C 78	318	" A 125	447	" P 514	616	" P 522
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33	1918 A 1	177	" P 84	321a	" LB 120	452	" P 91	624	" B 28
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41	1918 N 142	191	" L 168	324	" C 514	464	" P 37	630	" P 551
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47b	" C 3	206	" A 220	335	" LB 153	488	" L 248	645	" P 529
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49a	1919 M 653	209	" P 174	337a	" C 81	490	" L 310	648	1920 P 836
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64	" L 475	212	" L 205	341	" UB 31	492b	" L 163	657	" B 111
65	" L 459	213	" P 173	342	" C 99	493	" O 180	661	" C 439
71a	1918 N 147	214a	" A 308	344	" M 7	494	" LB 43	665	" B 143
71b	" B 117	214b	" L 347	347	" A 258	495	" L 227	667	" P 384
77	1919 L 473	215	" P 130	350	" L 229	496	" LB 50	670	" P 375
78	" M 610	216	" A 307	352a	" M 19	497	" B 164	671	1918 N 62
82	1918 N 135	217	" P 172	352b	" L 87	506	" LB 129	673	1919 B 138
83	1919 L 466	218	" A 302	353	" A 239	508	" C 59	675	" C 383
86	1918 N 134	219	" L 204	354a	" L 134	510	" L 420	677	" B 156
87	1919 L 471	221a	" A 300	354b	" M 487	513	" LB 60	679	" P 279
89	1918 N 121	221b	" P 171	367	" L 197	514	" M 190	681	" B 162
90	1919 M 620	223	" C 195	368	" A 356	516	" L 110	684a	" L 29
94	1918 P 251	225	" C 115	369	" L 136	517	" A 379	684b	" B 160
96	" N 49	226	" P 81	370	" A 167	519	" L 158	686	" L 195
97	" N 141	230	" C 156	373	" C 44	525	" C 85	687	" B 140
98	" S 25	231	" A 276	375	" P 534	526	" P 70	688	" C 67
99	" N 137	234	" P 132	379	" M 45	529a	" LB 117	689	" A 136
100	" S 25	236	" A 273	381	" A 160	529b	" P 212	691	" O 193
101	1919 M 851	237	" P 138	383	" C 248	533	" UB 32	695	" A 41
105	1918 N 140	238	" C 668	384	" A 158	534	" P 17	697	" B 172
106	" S 24	240	" L 333	385	" C 201	540	" UB 23	698	" A 323
107	" N 136	241	" C 444	386	" A 400	541	" P 547	699	" B 173
108	1919 M 846	244	" N 131	387	" B 59	543	" B 150	700	" A 44
110	1918 N 138	245	" P 266	389	" P 530	545	" P 556	701	" B 96
112	1919 C 511	247	" P 203	391	" B 39	551	" C 359	702a	" A 175
113a	" C 103	251	" C 207	392	" A 394	552	" P 545	702b	" B 93
113b	" UB 27	253	1920 P 553	394	" C 249	554	" L 199	704	" A 174
114	" A 159	256	1918 N 122	395a	" M 52	556	" P 528	705	" A 155
115	1920 UB 62	257	1919 C 509	395b	" A 376	557	" C 336	708	" N 64
117	1919 N 158	258	" L 284	396	" P 495	558	" P 477	710	" A 90
119	" A 249	265	" C 409	398	" C 93	559a	" M 542	711	" L 375
122	" C 367	266	" P 139	399	" B 174	559b	" P 565	716	" A 399
124	" N 160	268	" A 316	401	" A 260	561	" A 327	717	" L 409
125	" UB 30	270	" P 26	402	" P 250	562	" P 322	718	" A 38
127	" A 200	271	" P 54	403	" A 315	564	" A 430	720	" L 236
129	" M 24	273	" A 366	404	1920 M 862	566	" P 515	721a	" A 386
132	" P 416	274	" P 78	410	1919 A 311	570	" A 395	721b	" C 305
133a	" A 188	276	" A 370	413a	" A 309	571	" LB 38	725	" L 861
133b	" C 460	277	" S 93	413b	" P 319	572a	" A 369	727a	" O 360
135	" M 20	283	" A 345	416	" M 229	572b	" C 57	727b	" A 393
137	" A 185	286	" C 165	417	" B 97	573	" A 387	728	" O 895
139	" P 404	287	" M 654	419	" L 116	574	" C 430	728	" O 895

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731	1919 S 86	760	1918 N 64	773	" M 166	791	" O 348	824	1920 P 828
733	" M 193	761	1920 M 378	774	" A 398	792	" L 238	825	1919 M 41
737	1918 N 131	763a	1918 N 76	775	1918 N 44	794	" C 433	826	" P 341
739	1920 C 636	763b	1920 M 1014	777a	1919 A 330	798	" A 79	828	" M 128
742	1919 P 452	764	1918 N 31	777b	1918 N 61	799	" PC 108	829	1920 P 496
744	" O 323	766	1919 O 181	778	1919 A 66	815	" L 37	831	1919 A 396
745	" P 488	767	" A 445	780	" M 188	816	1918 N 46	832	1920 M 245
747	1918 N 123	768	" P 139	782	" C 1	817	1920 M 284	833	1919 C 11
748	1919 O 310	769a	" A 373	784a	" C 725	818	1919 P 143	835	" P 361
750	" A 376	769b	" S 66	784b	" A 413	819	1920 M 1025	837	1920 B 315
751	1918 N 107	770a	" A 402	785	1920 M 420	820	1919 P 311	840	1919 C 526
752	1919 C 182	770b	" A 402	787	1919 O 233	821	" P 321	843	" P 567
753	1918 N 67	770c	1918 N 59	787	1919 O 233	823a	1918 N 65	846	" C 8

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1	1918 PC 140	130	1919 M 47	261	1919 N 95	396	1919 B 67	522	1919 P 74
8	1919 C 542	132	" C 833	262	" C 232	402	" O 225	527	" M 464
11	" M 510	134	" L 129	263	" M 440	404	" M 545	530	" A 203
16	" C 743	135	" S 101	267	" C 173	406	" O 241	532	" C 57
20	" M 607	137	" C 368	268	" M 479	412	" L 305	533	" M 674
23	" M 616	138	" L 130	272	" C 111	414	" O 228	539	" L 233
27	" M 626	139	" M 30	273	" M 471	416	" M 284	540	1918 PC 118
34	" N 150	140	" L 176	275	" L 127	419	" O 417	543	1919 A 261
36	" M 100	141	" M 123	277	" LB 39	420	" L 104	545	" C 17
39	" O 114	147a	" L 92	278	" M 469	421	" S 42	587	" M 432
41	" M 43	147b	" M 121	281	" L 145	426	" C 107	590	" A 229
43	" O 121	150	" P 425	283	" M 473	427	" B 30	591	" A 225
44	" UB 1	156	" M 38	288	" LB 48	434	" M 275	593	" P 84
46	" O 129	159	" L 110	291	" M 322	435	" L 213	600	" C 391
48	" M 95	160	" S 70	302	" LB 44	437	" C 124	602	" M 98
54	" O 262	161	" M 24	303a	" M 274	438	" L 87	604	" L 356
55	" UB 16	164	" P 416	303b	" L 208	439	" P 291	607	" L 168
56	" O 131	165a	" A 188	305	" LB 105	441	" L 217	609	" C 759
57	" UB 19	165b	" C 460	306	" A 170	442	" P 270	617	" P 192
58	" O 153	167	" M 20	311	" L 297	449	1918 S 10	620a	" A 223
59	" UB 24	169	" A 185	312	" M 323	454	1919 C 50	620b	1918 PC 159
61	" O 177	171	" P 404	313	" M 367	457	" O 215	624	1919 C 168
62	" UB 25	173	" L 192	317	" LB 81	458	" LB 75	625	" M 656
63	" C 593	174	" P 407	337a	" L 433	462	" O 230	626	" M 409
67	" O 197	177	" L 292	337b	" M 353	463	" O 263	627	" P 10
69	" M 140	179	" M 113	343	" C 155	465	" C 100	629	" M 949
76	" C 728	188	" L 280	344	" L 300	466	" M 63	630	" M 434
77	" O 270	191	" M 373	346	" P 339	470	" L 249	637	" B 80
79	" C 123	193a	" P 374	348	" M 316	471	" M 679	638	" M 540
80	" O 278	193b	" S 88	349	" L 382	475	" C 157	641	1920 M 218
86	" M 20	195	" P 373	353	" A 126	476	" L 150	642	1919 P 22
87	" C 192	196	" M 483	355	" C 179	477	" C 316	647	" P 210
88	" O 873	198	" P 400	356	" O 190	478	" P 467	649	" C 69
89	" M 8	202	" M 446	357	" A 112	480	" C 43	650	" P 189
93	" C 807	203	" S 68	358	" L 79	481	" P 27	654	" A 220
94	" P 367	204	" M 669	359	" M 498	490	" C 203	656	" M 864
97a	" C 108	208	" P 376	362	" A 146	492	" M 896	657	" L 411
97b	" UB 27	210	" M 566	364	" M 486	494	" A 207	659	" M 583
98	" A 159	215	" P 377	366	" C 82	495	" C 78	664	" P 506
99	1920 UB 62	219	" N 152	367	" A 140	496	" N 115	666	" M 500
101	1919 N 158	220	" M 690	369	" M 359	497	" C 322	673a	" L 125
103	" A 249	229	" C 108	373	" M 312	498	" P 42	673b	" M 414
106	" C 367	230	" N 80	374	" P 321	501	" L 319	687	" A 218
108	" N 160	231	" L 103	375	" O 201	504	" P 18	688	" M 535
109	" UB 30	232	" C 134	381	" L 180	507	" C 75	691	1918 PC 149
111	" A 200	240	" N 83	382	1918 N 51	509	" O 403	695	1919 M 767
118	" A 194	245	" C 110	383a	1919 P 312	510	" C 170	696	" A 214
115a	" P 403	246	1918 N 18	393b	" L 188	511	" O 252	698	" L 237
115b	" O 879	248	1919 C 500	385	" M 304	513	" C 55	699	" M 711
118a	" C 154	250	" M 551	388	" B 73	514	" O 249	703	" L 874
118b	" A 190	255	" C 77	389	" P 578	515	" C 88	704	1918 PC 156
120	" C 97	256	" A 182	391	" L 311	517	" B 85	707	1919 L 135
123	" M 59	258	" C 116	393	" M 292	519	" C 416	708	1919 PC 182
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IC	AIR	IC	AIR	IC	AIR	IC	AIR	IC	AIR	IC	AIR
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721	" A 212	773	" P 173	818	1918 PC 148	878	" A 162	958	" P 237		
722	" M 946	774a	" A 303	821	1919 M 515	881	" L 119	959	" C 160		
724	" L 265	774b	" L 347	832	" P 124	882	" B 119	961	" N 136		
729	" M 837	775	" P 130	834	" C 127	886	" C 218	962	" P 471		
731	" C 168	776	" A 307	835	" M 871	892	" P 424	963	" B 94		
732	" A 267	777	" P 172	839	" P 136	893	Too old	965	" C 215		
733	" P 162	778	" A 302	840	1918 N 66	894	1918 B 1	968	" M 333		
734	" M 942	779	" L 204	841	1919 P 67	907	1919 P 482	974	" C 212		
736	" C 183	781a	" A 300	843	1918 N 69	910	" L 434	976	" A 255		
737	" A 331	781b	" P 171	845	1919 P 59	912	Too old	979a	" L 349		
742	" M 809	783	" C 195	848	" P 489	913	1919 C 444	979b	" C 798		
745	" C 125	785	" P 1	849	" C 115	916	" N 131	981	" P 481		
746	1918 N 30	794	" C 414	850	" P 81	917	" P 266	982	" L 95		
747	1919 A 314	796	" P 230	854	" C 156	919	" P 203	984	" C 778		
749	" L 134	798	" C 122	855	" A 276	923	" C 207	987	" L 157		
750	" M 561	799	" C 615	858	" P 132	925	1920 P 553	988	" C 826		
751	" C 766	800	" M 396	860	" A 273	928	1918 N 122	990	" A 209		
752	" P 185	802	" C 431	861	" P 138	929	1919 M 447	993	" C 225		
756	" C 217	803	" A 293	862	" C 668	946	" L 407	997	" L 243		
758	" M 343	805	" C 101	864	" L 333	948	" P 141	1000	" P 38		
766	" C 195	806	" M 717	865	" A 235	950	" N 135	1005	" L 138		
767	" P 176	808	" A 318	868	" P 244	951	" C 231	1006	" C 159		
769	" P 174	808	" A 318	868	" P 244	951	" C 231	1006	" C 159		
771	" A 311	811	" M 379	871	" L 252	953	" P 134	1007	" L 170		

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IC	AIR	IC	AIR	IC	AIR	IC	AIR	IC	AIR	IC	AIR
1	1918 PC 203	87b	1919 M 462	193	1919 O 287	311	1919 C 64	398	1919 A 142		
5	1919 C 510	90	" A 417	194	" S 66	312	" L 355	401	" L 155		
6	" L 154	91	1918 C 11	195	" O 269	314	" C 67	403	" B 154		
8	" P 108	92	1919 A 309	196	" N 75	315	" P 99	406	" C 424		
11	" L 254	94	" C 281	197	" O 368	319	" C 95	410	" M 445		
12	" C 109	101	" A 324	200	" A 414	321	" L 240	411	" B 24		
14	" M 678	104	" P 219	201	" O 381	322	" C 242	422	" L 147		
15	" C 253	109	" A 409	202	1918 PC 180	323	" P 36	424	" A 427		
17	" C 509	113	" L 178	205	1919 M 1	324	" LB 53	427	" B 133		
18	" L 284	115	" A 337	212	" O 178	327	" M 844	429	" PC 9		
25	" C 409	116	" L 181	215a	" L 112	328	" P 479	430	" A 426		
26	" P 139	117	" A 348	215b	" L 81	329a	" C 181	431	" C 502		
28	" A 316	119	" C 257	216	1918 PC 146	329b	" N 78	434	" PC 12		
30	" P 26	126	" A 340	220	1919 O 418	331	" C 121	437	1918 B 20		
31	" P 54	128	" L 263	222	" C 482	332	1920 O 311	444a	1919 P 188		
33	" P 128	130	" A 419	241	" L 118	333	1919 L 174	444b	1918 PC 151		
34	" C 198	132	" L 151	242	" C 181	335	" C 210	448	1919 P 131		
36	" L 331	134	" A 435	247	" M 321	337	" P 111	449	" B 141		
37a	" S 54	139	" L 272	249	" O 406	347	" A 385	451	" P 163		
37b	" C 449	140	" A 388	261	" M 594	348	" C 142	453	" C 129		
40	" P 129	142	" L 106	262	" C 71	350	" A 375	454	" P 71		
41	" S 68	143	" A 390	264	" PC 6	351a	" L 128	457	1918 PC 192		
43	" M 779	145	" O 122	270	" L 262	351b	" A 374	463	1919 P 181		
45	" C 240	146	1918 S 1	271	" O 307	353a	1920 O 308	468	" C 129		
48	" A 301	152a	1919 A 403	274	" N 124	353b	1919 M 809	470	1922 P 359		
49	" C 191	152b	" O 125	276	" C 73	355	" L 99	471	1919 M 878		
50	" A 318	154	" C 162	278	" A 447	357	" A 381	472	" P 47		
51	" C 189	156	" A 350	279	" P 425	360	" M 765	476	" C 677		
52	" P 93	157	" O 132	280	1918 PC 188	363	" C 727	479	" C 128		
58a	" M 439	160	" L 107	285	1919 C 264	364	" P 136	481	" L 184		
58b	" C 255	161	" A 366	288	" L 246	366	" L 84	485	" M 410		
59	" P 102	162	" P 78	290	" C 53	367	" P 478	487	" A 110		
65	" A 303	164	" A 370	291	" M 339	363	" A 397	489	" N 55		
69	" M 411	165	" S 93	296	" C 70	370	" C 125	491	" B 79		
70	" A 307	171	" A 345	298	" P 13	371	" M 351	492a	" L 136		
71	" C 520	174	" C 165	299a	" C 85	372	" A 338	492b	" B 158		
74	" A 406	175	" M 654	299b	" L 119	374	1920 C 574	494	" A 125		
77	" O 113	177	" C 837	301	" C 96	375	1919 A 138	496	" B 161		
79	" A 331	179	" A 396	303	" LB 37	378	1920 C 581	497	" P 232		
80a	" A 329	180	" O 154	304	" C 716	380	1919 M 317	498	1918 PC 19		
80b	" L 164	185	" M 312	306	" L 83	383	" C 467	506	1919 P 159		
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511	1919 P 92	640	1919 A 226	746	1919 L 271	832a	1919 M 19	924	1919 C 258
513	" LB 102	641	" C 171	747	" C 538	832b	" L 87	925	" M 66
514	" C 92	645	" L 200	748	" A 247	833	" A 239	930	" N 116
515	" P 202	646	" A 223	749	" PC 11	834a	" L 134	931	" M 358
517	" LB 45	647	" L 212	752	" A 243	834b	" M 487	933a	" O 216
518	" M 581	648	" A 222	756	" L 345	847	" L 197	933b	" C 59
520	" P 58	649	" C 126	758	" M 876	848	" A 356	935	" A 355
522	" LB 47	651a	" L 282	760a	" L 103	849	" PC 17	936	" N 102
523	" L 113	651b	1918 PC 226	760b	" C 118	855	" M 482	937	" C 68
524	" LB 46	654	1919 L 90	762	" L 133	856	" PC 84	938	" A 175
525	" C 245	655	" A 219	764	" N 129	857	1920 P 559	945	" O 367
528	" LB 51	657a	" LB 120	765a	" L 130	862	1919 C 144	946	" M 927
529	" P 430	657b	" UB 27	765b	" B 84	868	" L 103	948	" A 265
543	" LB 68	658	" C 153	767	" A 383	869	" O 206	951	1918 N 73
544	" P 134	659	" LB 125	769	" L 80	870	" C 55	952	1919 O 251
545	" LB 118	660	" C 514	770	" N 147	872	" P 120	953	" A 433
546	" P 523	666	" LB 153	772	" A 253	876	" O 208	956	" N 73
549	" LB 114	667	" A 217	774	" L 139	879	" C 295	959	" M 87
550	" L 114	668a	" LB 51	775	" M 444	880	" O 227	964	" L 369
551	" UB 2	668b	" UB 28	777	" A 231	882	" C 152	967	" N 113
552	" M 275	669	" C 669	778	" P 68	883	" A 189	969	" M 50
562	" UB 17	671	" LB 153	780	" A 228	884	" L 299	972	" B 75
564	" L 148	672	" UB 29	781	" N 141	886a	" M 23	975a	" L 132
566	" UB 20	673	" M 757	783	" P 61	886b	" A 269	975b	" C 391
567	" C 271	676	" C 155	789	" O 183	887	" O 236	977	" L 136
575	" UB 21	677	" A 206	790	" C 352	892	" M 26	978	" A 167
577	" M 429	678	" PC 14	795	" O 430	895a	" L 176	981	" C 44
580	" N 106	681	" N 103	797	" L 308	895b	" A 193	983	" P 534
584	" M 424	683	1918 B 32	798a	" O 305	897	" O 240	987	" M 45
591	" L 334	690	1919 C 133	798b	" C 720	898	" M 12	989	" A 160
593	" M 467	691	" A 202	800	" O 185	905	" A 270	991	" C 248
596	" C 519	693	" M 384	802	" C 256	907	" O 304	992	" A 158
597	" M 443	712	" P 90	805	" L 123	908	" C 589	993	" C 201
598	" C 191	713	" C 158	806	" C 474	909	" L 163	994	" A 400
599	1918 N 51	715	" B 1	809	" M 477	910	" N 143	995	" B 59
608	1919 C 476	727	" C 40	812	" PC 27	912	" B 101	997	" P 530
610	" L 422	729	" P 219	814	" A 238	912	" L 309	999	" B 33
611	" N 126	730	" A 297	815	" M 37	914	" O 233	1000	" A 394
613	" M 468	732	" C 86	817a	" C 81	915	" M 580	1002	" C 249
614	" L 91	734	" A 285	817b	" P 215	916	" L 124	1003	" M 52
615	" N 94	735	" L 109	821	" UB 31	917	" C 65	1003	" A 376
616	" M 397	736	" B 107	822	" C 99	918	" A 320	1004	" P 495
629	Too old	740	" A 280	824	" M 7	919	" L 350	1006	" C 93
631	1919 PC 1	743	" C 112	827	" A 258	922	" O 250	1007	" B 174
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1	1919 PC 162	52	1919 A 268	98	1918 C 51	139	1919 P 375	185	1919 PC 150
7	" B 66	53	" M 22	100	1919 L 125	140	" M 998	189	1920 P 600
8	" N 66	55	" A 264	101	" B 74	143	" A 288	191	1919 O 262
10	" M 573	56	" P 526	102	" M 192	144	" C 188	192	" A 255
11	" P 486	57	" M 105	104	" C 844	146	" A 286	193	" B 97
13	" C 234	64	" L 171	106	" N 87	148	1918 PC 213	195	" L 116
15a	" A 262	65	" A 257	107	" A 275	152	1922 P 121	197	" A 188
15b	" P 541	67	" M 231	103	" L 144	153	1919 A 283	198	" M 226
18	" B 61	69a	" P 578	109	" B 81	154	" C 261	201	" A 184
24	" N 70	69b	" O 116	111	" M 94	155	1920 M 852	202	" N 89
27	" P 484	70	1918 C 92	113	" A 274	158	1919 A 279	205	" A 164
28	" N 80	72	1919 B 44	114a	" M 256	160	" C 257	207	" P 253
31	" P 549	73	" A 289	114b	" P 527	161	" A 260	208	" A 160
34	Too old	76	" C 197	115	" C 317	162	" P 250	209	1918 B 54
36	1919 P 491	77	" P 537	119	" A 415	163	" A 315	215	1919 C 199
38	1920 M 934	79	" B 78	121	" L 304	164	1920 M 862	216	" A 317
40	1919 P 496	80	" C 479	123	1918 C 68	170	1919 A 311	217	" M 174
42	" M 225	84	1920 M 221	125	1919 A 272	173a	" A 309	217	" C 200
44	" C 400	86	1919 O 126	127	1918 C 70	173b	" P 319	221a	" M 198
46a	" P 521	88a	" A 387	129	1919 N 54	176	" M 229	221b	" P 417
46b	" M 514	88b	" C 235	130	" A 378	177	" PC 29	222	" B 135
49	" P 538	93	" N 100	131	" M 583	179	" B 88	223	
50	" C 311	95	1920 O 308	133	" A 105	184	" A 192	226	1918 PC 95



## 51 Indian Cases=All India Reporter—(Concl'd.)

SI Indian Cases—All India Reporter—(Concl'd.)																			
IC	AIR		IC	AIR		IC	AIR		IC	AIR		IC	AIR						
228	1919	B	122	385	1919	C	590	553	1919	A	222	709	1919	M	266	852	1919	C	369
233	"	C	323	386	"	M	183	554a	"	C	258	712	"	L	250	853	"	L	115
235	"	L	81	388	"	O	265	554b	"	O	191	714	"	M	257	854	"	C	351
236a	"	M	189	389	"	C	642	556	"	C	278	720	"	L	211	856	"	A	248
236b	"	L	372	391	"	L	222	561a	"	O	207	721	"	N	109	857	"	M	526
237	"	N	91	392	"	C	673	561b	"	C	260	723	"	L	255	859	"	N	140
239	"	L	102	394a	"	L	113	563	"	LB	111	724	"	M	562	860	"	L	366
240	"	M	100	394b	"	C	269	567a	"	L	83	728	"	L	6	862	"	C	407
241	"	C	325	396	"	L	299	567b	"	S	56	731	1918	N	16	864	"	N	128
242	"	A	128	397	"	C	796	568	"	LB	115	733	1919	P	395	865	"	A	302
250	"	L	85	399a	"	O	126	570	1918	S	6	734	"	M	207	866	"	C	333
252	"	M	32	402	"	O	267	574	1919	LB	119	736	"	C	773	869	1920	M	880
253	"	M	555	403	"	C	504	575	"	L	156	738	"	P	420	873	1919	P	501
255	"	P	329	405	1920	C	597	576	"	A	224	740	"	M	250	876	1920	M	815
257	"	B	103	408	1919	L	248	577	"	LB	69	746	"	C	331	880	1919	O	385
260	"	P	337	409	"	C	200	579a	"	S	65	747	"	P	392	881	"	P	497
262	"	B	36	410	"	L	228	579b	"	L	126	748	"	M	172	884	"	C	730
263	"	P	330	411	"	M	193	580	"	LB	124	750	"	UB	18	896	"	P	472
268	"	P	290	412	"	L	142	581	"	C	840	751	"	L	336	899	"	M	506
269	"	N	98	415	"	C	529	582	"	LB	126	753	"	P	225	904	"	C	421
271	"	P	514	417	"	L	88	583	"	C	436	755	"	L	12	905	"	L	193
273	"	L	400	419	"	O	126	588	"	LB	58	756	"	P	9	908	"	M	560
275	"	A	232	434	"	L	90	590	"	O	373	757	"	L	317	909	"	C	390
279	"	L	255	435	"	C	328	591	"	LB	128	758	"	P	53	910	"	B	17
280	"	P	316	437	"	L	273	593	"	C	618	760	1918	PC	92	918	"	C	422
283	"	A	227	439	"	M	177	595	"	L	253	763	1919	P	51	919	"	A	371
285	"	C	250	441	"	L	120	596	"	LB	104	766	"	L	313	922	"	C	381
286	1920	M	838	442	"	C	361	597	"	C	296	767	"	P	468	924	"	B	53
293	1919	B	145	443	"	L	297	607	"	L	105	769a	"	LB	117	928	"	C	345
295	"	M	200	444	"	P	281	608	"	LB	109	769b	"	P	212	929	"	B	56
298	"	L	93	447	"	L	152	609	"	P	381	773	"	UB	32	933	"	C	397
300	"	M	262	449	"	O	160	611	"	L	82	774	"	P	17	935	"	L	3
302	"	P	307	465	1920	P	670	612	1918	B	13	780	"	UB	23	936	1920	C	584
304	"	PC	111	468	"	M	824	620	1919	L	221	781	"	P	547	939	"	M	812
307	"	P	371	470	1919	A	329	621	"	O	384	783	"	B	150	941	1919	C	345
309	1918	B	26	471	"	P	305	622	"	L	418	785	"	C	187	943	1918	N	20
316	1919	P	369	472	"	L	248	623	"	C	308	786	"	P	233	945	1919	C	347
318	1920	M	893	473	"	A	205	624	"	A	112	787	1920	L	517	947	"	B	28
320	1919	P	344	474	"	L	310	636	"	L	231	791	1919	P	422	948	"	C	243
322	"	A	240	476a	"	C	201	638	"	A	148	793	"	C	332	949	"	P	177
324	"	C	209	476b	"	L	163	645	"	L	131	795	"	L	209	953	"	C	251
326	"	M	241	477	"	O	180	646	"	A	420	796	"	P	224	954	"	B	38
328	"	P	195	478	"	LB	43	651	"	L	235	797	"	C	373	955	"	C	330
331	"	A	295	479	"	L	227	652	"	C	46	799	"	L	190	956	"	L	20
333	"	C	61	480	"	LB	50	653	"	L	108	801	"	P	207	959	1920	C	550
335	"	C	74	481	1918	PC	206	654	"	C	337	805	1920	M	911	961	1919	P	480
337	"	A	357	484	1919	L	277	656	"	M	222	812	1919	L	351	962	"	C	314
340	"	P	91	486	"	C	426	657	"	B	164	815	"	A	246	963	"	M	528
341	"	N	111	489	"	M	202	666	"	LB	129	816	"	P	227	967	"	C	389
343	1920	M	928	494	"	C	293	668	"	C	59	819	"	L	341	968	"	B	37
351	1919	A	300	496	"	P	293	670	"	L	420	822	"	M	233	969	"	C	396
352	"	P	37	501	"	A	160	673	"	LB	60	826	"	C	343	971	"	L	363
353	"	B	131	507	"	M	168	674	"	M	190	827	1920	M	800	972	"	C	411
355	"	LB	38	512	"	M	187	676	"	L	110	829	1919	A	242	975	"	P	486
356	1920	C	601	513	1918	B	39	677	"	A	379	831	"	L	380	976	1920	C	610
359	1919	P	127	529	1919	M	255	679	"	L	158	833	"	P	556	979a	1919	L	354
360	"	LB	40	530	"	LB	71	685	"	C	85	839	"	C	359	979b	"	M	570
363	"	B	127	534	"	C	294	686	"	P	70	840	"	P	545	981a	"	C	253
366	1920	M	885	536	"	M	223	689	"	L	372	842	"	L	199	981b	"	P	196
372	1919	C	357	537	"	LB	79	690	1918	C	59	844	"	P	528	984	"	C	230
374	"	N	93	539	"	A	208	692	1919	M	209	845	"	C	336	985	"	O	217
375	"	C	503	540	"	M	546	695	"	L	121	846	"	P	477	993	"	C	228
376	"	LB	42	542	"	UB	3	697	"	P	165	847a	"	M	542	996	"	P	199
378a	"	L	93	545	"	O	188	704	"	L	393	847b	"	P	565	999	"	C	452
378b	"	C	42	548	"	A	217	706	"	P	554	849	1920	C	583	1006	"	O	215
380a	"	L	275	549	"	O	370	708	"	L	111	850	1919	A	252	1007	"	C	186
380b	"	N	144	552	"	C	349	708	"										

# Comparative Tables

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IC	AIR	IC	AIR	IC	AIR	IC	AIR	IC	AIR
1	1919 C 364	171	1919 C 190	352	1919 L 27	508	1920 P 593	649	1919 A 79
2	" O 285	173	" O 187	355	" C 729	509	1919 M 16	650a	" LB 110
4	" C 312	174	" LB 99	356	1920 L 443	510	" L 390	650b	1918 C 28
7	" O 303	177	" P 143	361	1919 P 423	512	" P 399	653a	1919 A 185
8	" B 12	179	" L 203	362	" A 211	513	" O 192	653b	" LB 123
11	" O 305	180	" C 54	363	" P 469	514	" P 396	655	" A 402
13	" C 379	181	" P 144	365	1922 N 266	516	" B 126	656	" LB 117
15	" O 116	185	" P 343	366	1919 A 403	517	" M 180	657	" A 136
18	" A 322	187	" A 377	370	" M 179	519a	" B 137	659	" O 193
19	" C 405	188	1920 L 470	373	" A 440	519b	" M 161	663	" A 41
20	1920 P 602	191	1919 A 32	380a	" M 93	522	1920 B 291	665	" B 172
23	1919 C 350	193a	" L 211	380b	" P 474	523	1919 P 406	666	" A 323
25	" A 351	193b	" P 350	382	1920 A 353	525a	" L 2	667	" B 173
29	" C 94	203	" L 433	383	1919 P 476	525b	" M 75	668	" A 44
31	" P 288	201	" PC 31	385	" A 351	539	" L 4	669	" B 96
32	" A 328	219	" P 362	386	" P 490	540	" M 14	670a	" A 175
33	" C 429	223	1920 C 567	389	" C 777	542	" L 5	670b	" B 93
34	1920 M 871	224	1919 A 389	390	" P 551	543	" P 445	672	" A 174
45	1919 O 311	225b	" P 503	394	1920 A 358	545	" L 18	673	1920 C 553
47	" C 419	229	" A 401	395	1919 L 256	546	1920 B 251	675	" M 834
48	" L 426	231	" P 507	393	" P 578	557	1919 L 10	681	1919 P 283
49	" A 327	235a	" O 185	401	" C 806	558	" C 325	682	" B 99
50	" P 322	235b	1920 A 353	402	" P 539	561	" L 23	684	" A 56
52	" A 430	237	1919 C 468	406	" C 839	562	" C 330	684a	1920 M 851
54	" P 515	239	" M 388	407	1920 P 845	563	" L 222	688b	1919 A 213
58	" A 395	241b	" P 517	410	1919 M 649	569	" M 150	689	1920 M 890
59	" LB 38	243	" M 332	411	" A 349	574	" L 30	690	1919 A 123
60a	" A 369	245	" L 404	412	" C 81	575	" C 369	692	" P 284
60b	" C 57	247	" M 293	413	" O 338	580	" L 47	694	1920 M 893
61	" A 387	253	" M 212	414	" M 652	582	" C 374	695	1919 B 92
62	" C 430	262	" O 401	416	" P 540	587	" L 25	696	" C 522
63	" A 35	263	" A 76	417	" P 528	588	" C 89	697	" M 91
64	" LB 55	265	" C 205	418	" A 26	590	" M 544	699	" C 408
65	" C 519	267	" P 531	421	" P 529	591	" L 318	700	1920 M 933
67	" A 367	269	" C 404	423	1918 N 50	593	" B 138	701	" P 358
69	" O 315	271	1920 P 821	424	1920 P 836	595	" C 383	702	1919 C 363
71	" C 423	273	1919 P 493	430	1919 P 570	597	" B 156	704	" M 132
73	" O 321	274	" O 402	433	" C 46	599	" P 279	711	" P 297
75	" O 335	276	" P 519	434	" M 45	601	" B 162	720	1920 M 936
79	" C 405	279	" A 46	435	" C 194	604a	" L 29	722	1919 C 413
82	" N 57	280	" P 522	436	" C 7	604b	" B 160	723	" P 305
88	" O 276	282	" P 511	439	" P 543	606	" L 195	725	1920 M 793
90	" C 321	283	" B 28	442	" M 167	607	" B 140	734	" P 708
91	" O 267	289a	" A 49	443	" C 335	608	" C 67	735	" M 900
94	" M 557	289b	" C 167	446b	" P 572	609a	" M 30	736	1919 N 120
98	" O 123	290	1920 P 589	448	" M 632	609b	" L 45	738	1920 M 906
99	" L 196	292	1919 L 344	449	" O 340	610	" C 385	739	1919 P 309
101a	" L 187	294	" L 337	452	1920 P 822	614	" M 43	742	" A 61
101b	" O 272	296	" LB 61	456b	1919 M 146	616	" C 393	744	" N 68
105	" P 325	304	" C 62	461	" P 393	619	" M 615	746a	" P 312
108	" O 360	305	" O 326	463	" C 814	621	" O 317	746b	1920 M 927
115	" L 177	309	" C 2	464	" L 198	622	" M 129	747	" C 557
116	" O 375	311	" A 391	465	" M 572	624	" LB 103	749	1919 M 52
119	" P 334	313	" M 186	466	" B 34	625	" M 17	756	" A 96
123	" O 128	314	" C 741	468	" M 31	628	" A 335	758	1920 M 910
125	1920 P 735	316	" P 247	470	" M 531	629	" LB 107	759	1919 C 342
128	1919 O 383	320	" L 279	473	" P 392	631	1920 M 783	761	1920 M 917
130	" S 57	322	" C 825	477	" M 104	632	1919 A 18	764	1919 P 210
137b	" P 328	324	" P 234	479	" L 53	634	" M 672	765	" M 220
139b	" S 80	325	" M 273	480	" C 120	636	" A 342	767	" C 266
147	1920 P 330	327a	" C 780	481	" B 111	637	" M 31	770	" B 45
152	1919 L 207	327b	" L 314	485	" C 439	638	" A 13	779	1920 A 229
153b	" N 50	331	" A 72	489	" B 143	639	" M 112	782	1919 M 229
153	" O 392	333	" PC 126	491	" P 384	640	" A 343	785	" A 155
157	" L 364	335	" P 566	494	" P 375	641	" M 183	788	" N 64
159	" O 150	337	" L 363	495	1918 N 62	642	" A 67	790	" A 90
161	" A 339	338	" P 561	497	1919 PC 39	643	" O 349	791	" L 375
162	" O 426	343	1920 A 356	501a	" C 358	644	" A 50	796	" A 399
165	1920 L 510	344	1919 P 465	501b	" P 441	645	" O 351	797	" L 409
167	1919 A 52	346	" L 418	503	" L 49	646	" A 187	797	" L 409
170	" O 175	348	1920 P 841	505	" M 164	647	" O 355	798	" A 88



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IC	AIR	IC	AIR	IC	AIR	IC	AIR	IC	AIR	IC	AIR
800	1919 L 236	847	1919 L 406	881b	1919 C 305	925	1919 LB 119	959	1919 P 238		
801a	" C 65	849	" O 247	885	" L 361	926	" L 276	961a	" UB 29		
801b	" A 82	850	" L 220	887a	" O 360	927	" LB 121	961b	" P 257		
802	1920 P 376	851	" O 286	887b	" A 393	928	" M 554	964	1920 P 678		
804	1919 S 70	857	" L 270	888	" O 395	929a	" LB 126	971	" M 859		
813	" M 743	858	" O 393	889	1920 C 562	929b	" C 194	974	1919 A 196		
818	" N 96	859	" L 381	891	1919 S 86	930	" LB 127	979	1920 M 219		
821	1920 M 728	860	1920 P 606	893	" M 193	931	1920 M 814	980	1918 C 45		
825	<i>Too old</i>	862	1919 L 398	897	1918 PC 135	933	" N 279	982	1919 P 240		
829	1919 M 1172	864	" S 104	899	1919 S 64	934	1919 LB 132	985	1918 C 55		
830	" A 448	865	" C 248	901a	" A 426	938	" C 66	986	1920 M 854		
832	" C 817	866	" P 313	901b	" S 92	937	" LB 132	989	1919 M 139		
834	" M 272	869	" O 397	902	" C 309	938	1920 M 822	990	1920 P 363		
836a	" O 398	870	" S 103	906	" S 49	940	1919 N 6	992a	1919 M 145		
836b	" A 392	871	" C 365	909	1918 PC 125	950	" M 534	992b	1920 M 843		
837	" O 210	873	" P 286	914	1919 M 571	951	" M 549	996	1919 P 268		
841	" L 391	875	" O 357	916	" S 53	953	" N 62	998	" P 276		
842	" M 542	878	" S 67	918	" M 247	956a	1920 M 231	1001	" M 93		
845a	" L 250	879	" M 547	919	" L 290	956b	1919 P 252	1002	" P 494		
845b	" O 213	881a	" A 386	921	1920 M 808	958	" UB 26	1003	" M 70		

## 53 Indian Cases=All India Reporter.

IC	AIR	IC	AIR	IC	AIR	IC	AIR	IC	AIR	IC	AIR
1	1920 M 359	119	1919 L 218	242	1919 N 119	425	1919 L 25	550	1919 N 117		
2	1919 P 386	121	" C 193	243	1920 M 906	426	" C 808	552	" S 79		
7	1920 M 567	122	" C 77	248	1919 C 251	427	" L 11	553	" C 13		
9	" P 351	123	" L 19	249	" M 28	428	1920 M 391	555	" M 32		
12	1919 C 161	124	" C 167	252	1920 B 337	435	1919 L 36	558	" C 16		
14	" M 224	125	" M 287	253	" M 857	437	" M 269	560	" S 89		
16	" P 390	131	" PC 24	256	1919 L 62	441a	" L 4	562	" C 886		
17	" C 840	135	" B 120	257	1920 M 1034	441b	" O 152	563	" L 259		
19	" C 166	136	" O 261	260	1919 C 117	443	" L 13	564	" C 592		
20	" P 454	137	" L 42	262	1920 M 919	444	1920 UB 56	566	" L 232		
32	" S 55	140	" O 134	271	1919 C 79	451	1919 L 51	567	" C 596		
33	" M 236	143	" C 169	274	" M 1166	453	" O 176	569	" L 237		
37	1920 P 423	145	1918 N 131	283	" M 374	454	" L 1	570	" C 470		
39	1918 C 26	147	1920 C 636	288	" PC 62	456	" O 181	572	" O 317		
41	1919 P 372	150	1919 P 452	301	" P 200	457	" L 33	576	" C 823		
42	" C 214	152	" O 323	308	1920 M 688	459	" O 266	577	" L 410		
43	1920 P 588	153	" P 488	331	1919 L 26	460	" L 16	579	1920 M 505		
44	1919 M 111	155	1918 N 123	332	1920 M 1013	462	" O 184	584	1919 L 234		
46	" C 224	156	1919 O 310	333	1919 L 32	463a	" L 8	585	" C 156		
49	1918 C 47	158	" A 376	334	" C 263	463b	" M 242	586	" L 374		
50	1919 O 260	159	1918 N 107	336	1920 M 1025	467	" L 3	587	" C 822		
52	" C 102	160	1919 C 182	337	1918 S 13	468	" UB 7	589	" L 189		
54	1918 PC 137	161	" M 215	345	1920 M 413	478a	" C 240	590	" M 154		
56	1919 M 244	164	" B 146	347	1919 PC 75	478b	" L 206	595	" L 415		
59	" C 314	168	" O 313	354	" M 305	480	" C 242	597	" C 842		
62	1921 N 116	171	" M 363	362	1920 C 648	481	1918 N 67	599	" B 152		
64	1919 C 154	175	" C 103	365	1919 B 15	483	1920 M 847	602	" C 847		
65	" N 76	180	" P 254	367	1920 M 355	485	1918 N 64	605	" M 159		
67	" C 202	184a	" C 725	372	" B 285	489	1920 M 378	609a	" A 373		
68	" L 15	184b	1920 M 713	379	1919 M 247	491a	1918 N 76	609b	" S 66		
70	1920 M 252	187	" B 331	382	1920 C 614	491b	1920 M 1014	610a	" A 402		
75	1919 O 271	188	1919 C 401	386	" M 627	492	1918 N 31	610b	1918 N 59		
77	1920 M 579	191	1920 M 867	395	" B 309	494	1919 O 181	612	1919 A 413		
79	1919 P 411	195	1919 N 149	397	" M 584	495	" A 445	613	" M 166		
83	" P 414	197	" B 115	399	" M 937	496	" P 139	614	" A 398		
85b	1920 P 570	201	" M 196	404	1919 L 24	497	" L 215	615	1918 N 44		
90	1918 C 56	202	" C 233	405	1920 M 407	498	1920 M 361	617a	1919 A 330		
91	1919 P 418	203	1920 M 812	407	1919 L 35	515	1919 C 402	617b	1918 N 61		
94	" C 84	205	1919 N 122	408	" M 264	518	1920 B 296	618	1919 A 66		
96	" P 409	207	1920 M 804	411a	" L 40	522	1919 PC 42	620	" M 188		
98	" O 299	212	1919 N 88	411b	" C 234	527	" N 104	622	" C 1		
103	1920 C 613	213	1920 M 427	412	1920 M 895	529	" C 362	624a	" C 725		
104	1919 O 120	227	1919 C 184	416	1919 L 14	534	" PC 79	624b	" A 413		
106	" P 442	229	" M 240	417	1920 M 898	541	" C 14	625	" C 776		
109	" O 124	231	" N 137	419	1919 L 9	543	1918 N 46	627	1920 B 419		
110	" P 398	234	1920 M 819	420	1920 C 658	545	1919 C 132	630	1919 PC 100		
111	" C 261	238	1919 C 524	421	1919 L 45	546	" S 47	639	" C 339		
114	" P 447	239	" M 218	423	1920 M 884	548	" C 410				

## 53 Indian Cases=All India Reporter—(Concl'd.)

I.C.	A. I. R.	I.C.	A. I. R.	I.C.	A. I. R.	I.C.	A. I. R.	I.C.	A. I. R.	I.C.	A. I. R.
642	1919 M 36	702	1919 A 79	796	1920 M 830	858	1919 L 385	928	1919 O 384		
644	" L 38	703	" PC 108	799	" B 256	862	" M 197	929	" C 11		
646	1920 M 417	719	" L 37	803	1919 P 236	863	" C 499	931	" P 361		
647	1919 O 324	720	1918 N 46	805	" B 40	865	" L 31	933	1920 B 315		
649	" L 182	721	1919 O 232	807	1920 M 481	866	" PC 91	936	1919 C 526		
650	" B 29	722	" S 98	813	1919 L 78	872	1918 C 58	939	" P 567		
652	" O 331	725	" O 288	814	" C 6	873	1919 M 184	942	" C 8		
653	" L 242	737	1918 C 64	815	" L 297	875	1920 C 679	945	" C 689		
654	" C 603	740	1920 O 312	817	1920 M 284	878	1919 M 370	947	1913 N 111		
659	" O 329	741	" C 669	818	1919 P 143	882	1918 C 62	955	1919 C 4		
661	1920 M 227	746	1919 O 350	819	1920 M 1025	883	1919 L 201	958	1920 M 290		
664	1919 O 332	747	1920 C 575	820	1919 P 311	885	" C 420	959	1919 C 329		
665	" M 538	753	1919 O 352	821	" P 321	886	" L 172	961	" O 420		
667	" O 343	756	" M 186	823a	1918 N 65	889	" O 396	963	" C 151		
672	" C 349	757	" O 254	823b	1919 M 274	890	" C 442	970	" O 398		
673	" M 527	760	" M 157	824	1920 P 828	892a	" O 374	973	" C 781		
674	" O 200	761	" O 258	825	1919 M 41	892b	" P 345	974	" O 429		
675	" C 458	764	1920 C 588	826	" P 341	898	" C 48	975	" C 805		
677	1920 M 900	770	1919 O 394	828	" M 128	901	" PC 44	976	1920 M 344		
683	1919 O 199	771	" M 191	829	1920 P 496	904	" C 432	986	1919 C 850		
684	" C 417	773	1920 C 704	831	1919 A 396	905	1920 M 666	992	" N 131		
689	1920 M 420	776a	1919 O 231	832	1920 M 245	921	1919 O 382	996	" C 341		
691	1919 O 233	776b	" N 29	833	1919 P 146	922	" P 365	999	" C 686		
694	" M 222	779	" C 461	847	1920 M 640	923	" O 856	1001	" C 447		
695	" O 348	783	" L 40	847	1920 M 640	923	" O 856	1004	" C 252		
696	" L 238	785	1920 M 826	854	1919 C 83	925	" C 619	1005	" O 404		
698	" C 433	794	1919 L 250	855	1920 M 271	926	" M 103	1007	" C 360		

(Financial Commissioner's Court's Cases are not included).

## TABLE No. III

Showing serialism the pages of the ALL INDIA REPORTER, 1919 LAHORE, with corresponding references of other REPORTS, JOURNALS AND PERIODICALS.

N.B.—Column No. 1 denotes pages of the ALL INDIA REPORTER, 1919 LAHORE.

Column No. 2 denotes corresponding references of other REPORTS, JOURNALS AND PERIODICALS.

## A. I. R. 1919 Lahore=Other Journals

A.I.R. Other Journals	A.I.R. Other Journals	A.I.R. Other Journals	A.I.R. Other Journals
1 53 I C 454	10 52 I C 557	20 51 I C 956	30 41 P L R 1920
126 P R 1919	27 P W R 1919	1 L L J 89	31 53 I C 865
65 P L R 1920	90 P R 1919	99 P L R 1919	1 Lah 241
2 52 I C 525	39 P L R 1920	47 P W R 1920	32 53 I C 333
95 P R 1919	11 53 I C 427	99 P W R 1919	52 P L R 1920
38 P L R 1920	120 P R 1919	23 52 I C 561	87 P W R 1919
3 (1) 51 I C 935	42 P L R 1920	89 P R 1919	33 53 I C 457
1 Lah 21	12 51 I C 755	38 P L R 1920	119 P R 1919
60 P L R 1920	1 Lah 66	24 53 I C 404	80 P L R 1920
36 P W R 1920	88 P L R 1920	110 P R 1919	35 53 I C 407
3 (2) 53 I C 467	85 P W R 1919	48 P L R 1920	113 P R 1919
114 P R 1919	1 L L J 154	25 (1) 53 I C 425	53 P L R 1920
47 P L R 1920	13 53 I C 443	131 P R 1919	36 53 I C 435
4 (1) 52 I C 539	135 P R 1919	49 P L R 1920	133 P R 1919
96 P R 1919	57 P L R 1920	110 P W R 1919	55 P L R 1920
33 P L R 1920	14 53 I C 416	25 (2) 52 I C 587	37 53 I C 719
4 (2) 58 I C 441	128 P R 1919	86 P R 1919	2 L L J 239
134 P R 1919	54 P L R 1920	24 P L R 1920	120 P L R 1920
46 P L R 1920	15 53 I C 68	26 53 I C 331	20 Cr L J 815
5 52 I C 542	1 Lah 77	1 Lah 203	38 53 I C 644
94 P R 1919	22 P L R 1920	51 P L R 1920	1 Lah 54
40 P L R 1920	81 P W R 1919	86 P W R 1919	101 P L R 1920
6 51 I C 728	16 53 I C 460	27 52 I C 352	43 P W R 1920
1 Lah 140	121 P R 1919	1 Lah 158	40 (1) 53 I C 411
89 P W R 1919	78 P L R 1920	95 P L R 1919	125 P R 1919
8 53 I C 468	18 52 I C 545	20 52 I C 604	44 P L R 1920
122 P R 1919	87 P R 1919	27 P R 1919 Cr	40 (2) 53 I C 783
45 P L R 1920	85 P L R 1920	31 P L R 1920	1 Lah 146
9 58 I C 419	19 53 I C 123	20 Cr L J 684	1 L L J 203
112 P R 1919	23 P L R 1920	32 I C 574	42 53 I C 137
43 P L R 1920	88 P W R 1919	92 P R 1919	



## A. I. R. 1919 Lahore=Other Journals—(Contd.)

A. I. R. Other Journals.				A. I. R. Other Journals.				A. I. R. Other Journals.				A. I. R. Other Journals.			
42	1	Lah	83	78	53	IC	813	109 (1)50	IC	735	136 (1)50	IC	492		
	84	P W R	1919	79	49	IC	358	109 (2)178	P W R	1918		97	P L R	1918	
45	(1)52	IC	609		15	P R	1919		50	IC	868		20	Cr L J	316
	88	P R	1919		43	P L R	1919	110 (1)49	IC	159	136 (2)50	IC		977	
	36	P L R	1920	80	50	IC	769		11	P R	1919		18	P L R	1919
45	(2)53	IC	421	81 (1)50	IC	215			3	P L R	1919		20	Cr L J	369
	130	P R	1919	81 (2)51	IC	235	110 (2)51	IC	676		138	49	IC	1005	
	59	P L R	1920	SB	25	P R	1919		22	P R	1919	Cr	118	P R	1919
	106	P W R	1919		71	P L R	1919		20	Cr L J	516		29	P W R	1919
47	52	IC	580	82	51	IC	611	111	51	IC	708		57	P L R	1919
	85	P R	1919		50	P W R	1919		62	P R	1919	139	50	IC	774
	50	P L R	1920		144	P R	1919		86	P L R	1919		21	P L R	1919
49	52	IC	503		1	L L J	74	112	50	IC	215	140	50	IC	637
	68	P R	1919	83 (1)51	IC	567			59	P L R	1919	142	51	IC	412
	37	P L R	1920		36	P L R	1919	113 (1)51	IC	394			42	P R	1919
51	53	IC	451		108	P W R	1919		40	P R	1919	144	51	IC	108
	124	P R	1919	83 (2)50	IC	306			81	P L R	1919		46	P L R	1919
	67	P L R	1920	84	50	IC	366	113 (2)50	IC	523			71	P W R	1919
53	52	IC	479	85	51	IC	250	114	50	IC	550	145	49	IC	281
	66	P R	1919		29	P R	1919	115	51	IC	853	FB	17	P R	1919
	32	P L R	1920	87 (1)50	IC	832			3	L L J	17		6	P W R	1919
	72	P W R	1919		2	P W R	1919	Cr	92	P W R	1919	147	50	IC	422
54	2	L L J	99		34	P L R	1919	116	51	IC	195		20	P R	1919
56	67	IC	320		20	Cr L J	352		9	P R	1919	Cr	121	P L R	1919
	84	P L R	1922	87 (2)49	IC	438			20	Cr L J	419	148	50	IC	564
	1	L L J	150		15	P W R	1919		17	P W R	1919	Cr	150	49	IC
57	32	P R	1919	88	51	IC	417	118	50	IC	241		23	P W R	1919
	54	IC	994		43	P R	1919		111	P R	1919		2	P R	1919
	2	L L J	82	90 (1)51	IC	434		119 (1)49	IC	881	151	50	IC	132	
	21	Cr L J	210		45	P R	1919		34	P W R	1919		44	P W R	1919
	128	P L R	1920		83	P L R	1919	119 (2)50	IC	299	152	51	IC	447	
60	69	IC	608	90 (2)50	IC	654			177	P W R	1918	154	50	IC	6
	1	L L J	79		102	P R	1919	120	51	IC	441		101	P L R	1919
62	53	IC	256		32	P L R	1919		47	P R	1919		101	P W R	1919
	1	L L J	69		5	P W R	1919		72	P L R	1919	155	50	IC	401
	62	P L R	1919	91	50	IC	614	121	51	IC	695		10	P W R	1919
	88	P W R	1919		3	P W R	1919		63	P R	1919		1	P L R	1919
63	54	IC	833		30	P L R	1919	123	50	IC	805	156	51	IC	575
	65	P W R	1920	92	49	IC	147		22	P L R	1919		38	P L R	1919
65	54	IC	400		8	P R	1919	124	50	IC	917	157	49	IC	987
	1	Lah	220		52	P L R	1919		19	P L R	1919		115	P R	1919
	1	P L R	1920	93 (1)51	IC	378		125 (1)49	IC	673		158	38	P W R	1919
	16	P W R	1920		35	P R	1919		19	P R	1919		51	IC	679
66	(1)67	IC	935		78	P L R	1919	125 (2)51	IC	100			102	P L R	1919
	3	L L J	364	93 (2)51	IC	298			45	P L R	1919		22	P W R	1919
66	(2)65	IC	687		33	P R	1919	126	51	IC	579		20	Cr L J	519
	2	L L J	191		94	P W R	1919		39	P L R	1919	163 (1)51	IC	476	
66	(3)44	IC	912	95	49	IC	982		14	P W R	1919		13	P R	1919
	72	P L R	1918		32	P W R	1919	127	49	IC	275		73	P L R	1919
	73	P W R	1918	96	49	IC	954		104	P R	1918		20	P W R	1919
67	44	IC	971		39	P W R	1919		140	P L R	1918		20	Cr L J	492
	7	P W R	1918	99	50	IC	355	128	50	IC	351	163 (2)50	IC	909	
	19	Cr L J	443	102	51	IC	239		6	P W R	1919	Cr	164	96	P W R
	50	P L R	1918		27	P R	1919		20	Cr L J	303		50	IC	80
68	44	IC	910	103	50	IC	760	129	49	IC	134	168	49	IC	607
	74	P W R	1918		4	P L R	1919		5	P R	1919		20	P R	1919
	74	P L R	1918	104	49	IC	420	130 (1)50	IC	765			14	P W R	1919
69	44	IC	559		19	P W R	1919	130 (2)49	IC	138			20	Cr L J	191
	57	P W R	1918	105	51	IC	607		1	P R	1919	170	49	IC	1007
70	44	IC	866		53	P R	1919	131	51	IC	645		30	P W R	1919
	71	P R	1918		85	P L R	1919		55	P R	1919	171	51	IC	64
71	44	IC	853	106	50	IC	142	132	50	IC	975		17	P W R	1919
	72	P W R	1918		100	P R	1919		16	P W R	1919	172	53	IC	886
	71	P L R	1918		46	P W R	1919	133	50	IC	762	174	50	IC	333
72	44	IC	859	107	50	IC	160		117	P R	1919	176 (1)49	IC	140	
	11	P L R	1918		47	P W R	1919	134 (1)50	IC	834			12	P R	1919
	71	P W R	1918	108 (1)49	IC	231			20	Cr L J	354	176 (2)50	IC	895	
	70	P R	1918		41	P R	1918	134 (2)49	IC	749			40	P L R	1919
76	44	IC	883	108 (2)51	IC	653			21	P R	1919	177	52	IC	115
	60	P R	1918		60	P R	1919	135	49	IC	707		37	P L R	1919
	76	P W R	1918		74	P L R	1919		24	P R	1919				

# Comparative Tables

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## A. I. R. 1919 Lahore=Other Journals—(Contd.).

A.I.R.	Other Journals	A.I.R.	Other Journals	A.I.R.	Other Journals	A.I.R.	Other Journals
178	50 I C 113	209	99 P R 1919	248(1)20	Cr L J 468	283	147 P W R 1918
	42 P W R 1919	211(1)	52 I C 193	248(2)51	I C 408	284	50 I C 18
180	49 I C 381		20 Cr L J 577		37 P R 1919		15 P W R 1919 Cr
	79 P R 1919		10 P L R 1919	249	49 I C 470		20 Cr L J 258
	12 P W R 1919	211(2)	51 I C 720		20 P W R 1919	290	52 I C 919
181	50 I C 116		65 P R 1919	250(1)	52 I C 845		69 P R 1919
	41 P W R 1919		87 P L R 1919		72 P R 1919	292 (1)	48 I C 379
182	53 I C 649	212	50 I C 647	250(2)	51 I C 712		109 P R 1918
	51 P R 1919	213	49 I C 425		64 P R 1919		23 P L R 1919
184	50 I C 481		75 P R 1919	252	49 I C 871	292 (2)	49 I C 177
	98 P L R 1918		13 P W R 1919		8 P L R 1919		9 P R 1919
	20 Cr L J 305	215	53 I C 497		37 P W R 1919	294	46 I C 419
187	52 I C 101		187 P R 1919	253	51 I C 595		22 P R 1919
	20 P L R 1919		120 P L R 1919		52 P R 1919		42 P L R 1918
188	49 I C 383	217	49 I C 441		84 P L R 1919		93 P W R 1918
	14 P R 1919		21 P W R 1919	254	50 I C 11	296 (1)	48 I C 390
189	53 I C 589	218	53 I C 119		106 P R 1919		111 P R 1918
	97 P R 1919		82 P W R 1919		63 P L R 1919		24 P L R 1919
	118 P L R 1919	220	52 I C 850		95 P W R 1919	296 (2)	47 I C 422
190	51 I C 799		74 P R 1919	255(1)	51 I C 723		78 P R 1918
	58 P W R 1919		98 P L R 1919		13 P L R 1919		105 P L R 1918
	1 L L J 55		107 P W R 1919		91 P W R 1919		155 P W R 1918
192	49 I C 173	221	51 I C 620	255(2)	51 I C 279	297 (1)	49 I C 311
	1 P R 1919 Cr		54 P W R 1919		32 P R 1919	297 (2)	51 I C 443
	20 Cr L J 141	222(1)	51 I C 391		77 P L R 1919		49 P R 1919
193	51 I C 905		39 P R 1919		70 P W R 1919	299 (1)	51 I C 396
	1 L L J 161		80 P L R 1919	256	52 I C 395		41 P R 1919
	97 P W R 1919	222(2)	52 I C 563		21 P R 1919 Cr		82 P L R 1919
195	52 I C 606		91 P R 1919		18 P W R 1919 Cr	299 (2)	50 I C 884
	28 P R 1919 Cr	227	51 I C 479		20 Cr L J 635		47 P L R 1919
	20 Cr L J 686		15 P R 1919 Cr	259	53 I C 563	300	49 I C 344
196	52 I C 99		88 P L R 1919		107 P R 1919		4 P R 1919 Cr
	7 P L R 1919		20 Cr L J 495	260	53 I C 794		7 P W R 1919 Cr
197	50 I C 847	228	51 I C 410		1 L L J 197		20 Cr L J 152
	12 P R 1919 Cr		38 P R 1919	262	50 I C 270	302	46 I C 888
	75 P L R 1919	229	50 I C 890		127 P R 1919		54 P R 1919
	21 P W R 1919 Cr		11 P R 1919 Cr	263	50 I C 128		144 P W R 1918
	20 Cr L J 367		20 Cr L J 350	265	49 I C 724	304	51 I C 121
198	52 I C 464	231	51 I C 636		80 P R 1919		34 P R 1919
	84 P R 1919		3 L L J 276		35 P W R 1919		68 P W R 1919
	6 P L R 1919		155 P R 1919	270	52 I C 857	305	49 I C 412
199	51 I C 842		55 P W R 1919		76 P R 1919		24 P W R 1919
	10 P R 1919 Cr	232	53 I C 566	271	50 I C 746	307	48 I C 723
	20 Cr L J 554		103 P R 1919	272	50 I C 139		116 P R 1918
200	50 I C 645	233	49 I C 599		43 P W R 1919		25 P L R 1919
	70 P R 1919		36 P W R 1919		64 P L R 1919	308	50 I C 797
	31 P L R 1919	234	53 I C 584	273	51 I C 497	309	50 I C 914
	4 P W R 1919		101 P R 1919		46 P R 1919	310	51 I C 474
201	53 I C 883		113 P L R 1919	275(1)	51 I C 380		18 P R 1919 Cr
	116 P R 1919	235	51 I C 651		36 P R 1919		19 P W R 1919 Cr
203	52 I C 179		56 P R 1919		79 P L R 1919		20 Cr L J 490
	169 P R 1919		89 P L R 1919	275(2)	46 I C 584	311	49 I C 391
204	64 P W R 1919	236	52 I C 800		44 P R 1919	313 (1)	46 I C 571
	49 I C 779		23 P R 1919 Cr		85 P L R 1918		6 P R 1919
	6 P R 1919 Cr		20 Cr L J 720		86 P W R 1918		11 P L R 1919
	49 P L R 1919	237(1)	49 I C 698		51 P L R 1919		135 P W R 1918
	9 P W R 1919 Cr		23 P R 1919	276(1)	47 I C 8	313 (2)	51 I C 766
205	20 Cr L J 219	237(2)	53 I C 569		149 P W R 1918		57 P W R 1919
	49 I C 772		104 P R 1919		30 P R 1919	314	52 I C 327
	7 P R 1919 Cr		111 P L R 1919	276(2)	52 I C 926		145 P R 1919
	48 P L R 1919	238	53 I C 696		38 P W R 1919		1 L L J 138
	8 P W R 1919 Cr		17 P R 1919 Cr		69 P L R 1919	317	51 I C 757
206	20 Cr L J 212		20 Cr L J 792	277	51 I C 484		56 P W R 1919
	53 I C 478	240	50 I C 321		50 P R 1919	318	52 I C 591
	136 P R 1919	242	53 I C 653	279	52 I C 320		25 P W R 1919
207	52 I C 152	248	49 I C 997		1 L L J 116	319	49 I C 501
	1 L L J 148		28 P W R 1919	280	49 I C 188		22 P W R 1919
	67 P W R 1919	246	50 I C 288		10 P R 1919	321	50 I C 86
208	49 I C 303	248(1)	51 I C 472	282	50 I C 651		48 P W R 1919
	9 P W R 1919		18 P R 1919 Cr		54 P L R 1919	322	47 I C 592
209	51 I C 795		28 P W R 1919 Cr	283	46 I C 811		4 P R 1919



## A. I. R. 1919 Lahore=Other Journals—(Concl'd.)

A. I. R. Other Journals	A. I. R. Other Journals	A. I. R. Other Journals	A. I. R. Other Journals
322 65 P L R 1918	363 (1)51 I C 971	393 1 PWR 1919Cr	433 (2)44 P L R 1919
166 P W R 1918	363 (2)47 I C 992	400 51 I C 273	4 4 PWR 1919Cr
323 49 I C 711	61 P R 1919	31 P R 1919	20 Cr L J 145
FB 16 P R 1919	175 P W R 1918	69 P W R 1919	434 49 I C 910
11 P W R 1919	364 52 I C 157	402 48 I C 916	436 1 L L J 212
332 46 I C 11	66 P W R 1919	8 P W R 1919	437 (1)1 L L J 220
7 P R 1919	366 51 I C 860	52 I C 245	437 (2)1 L L J 238
123 P W R 1918	93 P W R 1919	132 P R 1919	439 47 I C 937
333 49 I C 864	368 52 I C 337	66 P W R 1919	88 P R 1918
56 P L R 1919	93 P L R 1919	52 I C 847	167 P W R 1918
11 PWR 1919 Cr	73 P W R 1919	71 P R 1919	120 P L R 1918
20 Cr L J 240	1 L L J 101	407 49 I C 946	440 48 I C 167
334 50 I C 591	369 50 I C 964	40 P W R 1919	19 Cr L J 187
123 P R 1919	92 P L R 1919	52 I C 797	447 (1)47 I C 962
336 51 I C 751	372 (1)51 I C 236	25 P R 1919Cr	96 P R 1918
100 P L R 1919	26 P R 1919	20 Cr L J 717	447 (2)48 I C 231
100 P W R 1919	70 P L R 1919	53 I C 577	182 P W R 1918
337 52 I C 294	372 (2)51 I C 689	109 P R 1919	448 47 I C 977
154 P R 1919	58 P R 1919	49 I C 657	95 P R 1918
63 P W R 1919	374 (1)49 I C 703	83 P R 1919	128 P L R 1918
339 46 I C 679	18 P R 1919	18 P W R 1919	174 P W R 1918
13 P R 1919	374 (2)53 I C 586	52 I C 346	449 47 I C 442
140 P W R 1918	105 P R 1919	94 P L R 1919	24 P R 1918Cr
341 51 I C 819	114 P L R 1919	74 P W R 1919	14 P L R 1919
59 P W R 1919	375 52 I C 791	1 L L J 109	26 PWR 1918Cr
344 52 I C 292	24 P R 1919 Cr	53 I C 595	19 Cr L J 926
150 P R 1919	20 Cr L J 711	98 P R 1919	450 48 I C 424
60 P W R 1919	380 51 I C 831	51 I C 622	91 P R 1918
345 50 I C 756	93 P W R 1919	53 P W R 1919	458 66 I C 185
347 49 I C 774	1 L L J 168	418 (2)47 I C 444	26 PWR 1919Cr
8 P R 1919Cr	381 52 I C 859	27 P R 1918Cr	1 L L J 245
95 P L R 1918	77 P R 1919	15 P L R 1919	97 P L R 1919
10 PWR 1919 Cr	382 49 I C 349	37 PWR 1918Cr	23 Cr L J 249
20 Cr L J 214	3 P R 1919Cr	19 Cr L J 928	459 48 I C 865
348 47 I C 872	5 PWR 1919 Cr	47 I C 596	31 P R 1918Cr
28 P R 1918 Cr	20 Cr L J 157	48 P R 1919	20 Cr L J 65
39 PWR 1918Cr	385 53 I C 858	66 P L R 1918	464 47 I C 17
16 P L R 1919	389 48 I C 493	169 P W R 1918	37 P L R 1918
19 Cr L J 972	5 P R 1919Cr	51 I C 670	91 P W R 1918
349 49 I C 979	13 PWR 1919Cr	19 P R 1919Cr	466 48 I C 883
31 P W R 1919	20 Cr L J 3	20 Cr L J 510	36 P R 1918Cr
350 50 I C 922	390 52 I C 510	50 I C 610	20 Cr L J 83
67 P L R 1919	67 P R 1919	29 P L R 1919	470 48 I C 492
351 51 I C 812	90 P L R 1919	2 P W R 1919	30 P R 1918Cr
52 P W R 1919	391 52 I C 841	1 L L J 46	20 Cr L J 1
1 L L J 1	73 P R 1919	1 L L J 26	471 48 I C 887
354 51 I C 979	393 51 I C 704	52 I C 48	35 P R 1919Cr
90 P W R 1919	57 P R 1919	9 P L R 1919	20 Cr L J 87
355 50 I C 312	395 47 I C 508	1 L L J 209	472 48 I C 486
112 P W R 1919	59 P R 1919	1 L L J 242	32 P R 1918Cr
93 P R 1919	164 P W R 1918	56 I C 940	20 Cr L J 11
356 49 I C 604	397 53 I C 815	39 I C 654	473 48 I C 877
12 PWR 1919 Cr	161 P R 1919	15 P R 1917	34 P R 1918Cr
20 Cr L J 188	398 52 I C 862	75 P W R 1919	20 Cr L J 77
359 48 I C 919	78 P R 1919	430 1 L L J 230	475 (1)48 I C 832
7 P W R 1919	399 48 I C 510	433 (1)52 I C 208	33 P R 1918Cr
361 52 I C 885	20 Cr L J 30	20 Cr L J 592	20 Cr L J 64
26 P R 1919Cr	33 P L R 1919	433 (2)49 I C 337	475 (2)48 I C 8
20 Cr L J 725	14 P R 1919Cr	2 P R 1919Cr	FB 90 P R 1918

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1919

LAHORE HIGH COURT

A. I. R. 1919 Lahore 1

RATTIGAN, C. J.

*Nabi Bakhsh*—Plaintiff—Appellant.

v.

*Maula and others*—Defendants—Respondents.

Second Appeal No. 121 of 1918, Decided on 5th March 1919, from decree of Dist. Judge, Sialkot, D/- 10th October 1917.

Specific Relief Act (1 of 1877), S. 39—Suit for cancellation of instrument on ground of fraud—Decree for cancellation passed.

Plaintiff sued for cancellation of a deed of mortgage executed by him in favour of the defendants, alleging that he had been induced to execute the deed by fraud and that there was no consideration for his contract. It was found that the transaction was in fact fictitious and that plaintiff and defendants had conspired to concoct the mortgage to the detriment of plaintiff's reversioner :

*Held* : that inasmuch as the reversioner's rights would come into operation only on the death of the plaintiff, it could not be said that the purpose of the fraud had been carried into effect, and that therefore the plaintiff was entitled to get the deed cancelled. [P 1 C 2]

*Jai Gopal Sethi*—for Appellant.

*Sham Lal*—for Respondents.

**Judgment.**—Plaintiff sued for cancellation of a certain deed of mortgage of land executed by him on 20th July 1916 in favour of the defendants, alleging that he had been induced to execute the deed by fraud and that there was no consideration for his contract. The plaint did not specify what the fraud was, but it was explained later, on behalf of the plaintiff, that defendants had promised to secure a wife for him and that they had no intention of carrying out their promise and had in fact failed to do so. Defendants pleaded that full consideration had

passed and that they had never undertaken to secure a wife for the plaintiff. The first Court found that no consideration had passed and granted the plaintiff the decree for which he prayed. Defendants appealed to the District Judge, who found that the consideration for the mortgage was unproved, at any rate to the extent of Rs. 575 (out of the alleged total of Rs. 800), and that the transaction was in fact fictitious, but he disbelieved the plaintiff's story that the consideration for a transaction was a promise on the part of the defendants to secure him a wife and that what really happened was that plaintiff and defendants had conspired to concoct the fictitious mortgage to the detriment of Khuda Bakhsh, plaintiff's near reversioner. Upon these findings he held that the parties were in *pari delicto* and that as the fraud was not only concocted but also carried into effect to the detriment of Khuda Bakhsh each party was estopped from showing the truth as against the other and that therefore plaintiff was not entitled to the relief which he claimed. He accordingly accepted the appeal and dismissed plaintiff's suit with costs.

The District Judge's enunciation of the law is undoubtedly correct, but it appears to me that in the present case the purpose of the fraud had not been carried into effect and that on this ground plaintiff was entitled to ask for the cancellation of the mortgage deed. Obviously, Khuda Bakhsh, whose rights would come into operation only on the death of the plaintiff, had not been defrauded in any way up to the time when the plaintiff brought his suit, and so far as Khuda Bakhsh is concerned, the can-



cellation of the deed would be a step towards doing away with the possibility of any fraud being perpetrated at his expense. On the other hand, as regards the defendants, it is clear that at the time when the plaintiff instituted his suit nothing had been done to carry the mortgage into effect. Rs. 575 had, upon the findings of both the Courts, not been paid by the defendants, nor had the latter paid off, as they undertook to do, the previous mortgagee. The land had consequently not passed to the defendant and the previous mortgagee was at that time in possession. It is alleged that on 7th May 1910, i. e., at the time when the trial of the case in the first Court had terminated and the suit was ripe for judgment, the defendants paid off the previous mortgagee. This however was long subsequent to the institution of the suit and was obviously done in order to make evidence on behalf of the defendants. From the facts then as established, it is clear that, even if both the parties had conspired to defraud Khuda Bakhsh, nothing had been done at the time when the suit was brought to carry that fraud into effect, and in this connexion the ruling of their Lordships of the Privy Council in *Petherpermal Chetty v. Muniandy Chetty* (1) is in point and is an authority for holding that the plaintiff is not debarred from asking for the relief which he claimed.

I therefore accept the appeal and set aside the decree of the District Judge and restore that of the Munsif. Defendants must pay plaintiff's costs throughout.

R.M./R.K.

*Appeal accepted.*

(1) [1909] 35 Cal. 551=35 I. A. 98 (P. C).

## A. I R. 1919 Lahore 2

SHADI LAL AND LEROSSIGNOL, JJ.

Suba—Appellant.

v.

Kutba and another—Respondents.

Second Appeal No. 1772 of 1915, Decided on 3rd February 1919, from decree of Dist. Judge, Jullundur, D/- 3rd May 1915.

**Pre-emption—Suit for—Sale of occupancy right in favour of landlord—Occupancy tenant cannot challenge or pre-empt sale.**

An occupancy tenant cannot challenge a sale of occupancy rights by another occupancy tenant in favour of the landlord and cannot successfully maintain a suit to pre-empt on such a sale.

[P 2 C 2]

*Shamair Chand*—for Appellant.

*Fakir Chand*—for Respondents.

**Judgment.**—One Kutba, an occupancy tenant, has sold his occupancy rights in 54 kanals of land to his landlord, and the plaintiff, who is the nephew of the vendor, has brought this suit for a declaration that he is entitled to retain possession of the area sold as mortgagee, and failing to obtain that relief he asks for a declaration that as the sale is fictitious and without consideration, it shall not affect his reversionary rights, and as a final alternative he asks to be allowed to pre-empt the land sold.

Appellant's counsel before us admits that in regard to the two latter reliefs the case is covered by authority and that the plaintiffs, an occupancy tenant cannot challenge the sale to the landlord and cannot successfully maintain a suit to pre-empt on such a sale. With regard to the first relief claimed however the District Judge has not come to any finding of fact, and on the material on the record before us we are unable to arrive at any conclusion on the facts involved in the case. The learned District Judge has disposed of this point by remarking that even if such a mortgage did exist it would be a nullity, and for this position he relies on Ss. 53 and 56, Tenancy Act. We are however unable to concur in this view, for if, as the plaintiff alleges, there was an old standing mortgage by himself, by Kutba vendor, and by the vendor's father which the plaintiff alone redeemed, then we hold that in respect of the occupancy land included in the mortgage which belonged to Kutba and Kutba's father, the plaintiff stands in the shoes of the original mortgagee and that the vendee in purchasing from Kutba takes what Kutba has to sell subject to the mortgagee rights. From this it follows that it must be ascertained whether the plaintiff redeemed the share of Kutba and Kutba's father with his own moneys and what amount he paid. If it be found that he did redeem Kutba's and Kutba's father's share of the mortgaged area, he is entitled to possession of that area until his mortgagee rights have been satisfied. Had Kutba effected a recent mortgage in favour of the plaintiff, the landlord-vendee could have claimed to ignore it, but the case is not the same when one of the mortgagors redeem a mortgage to



which the landlord must be taken to have given his acquiescence.

For these reasons whilst agreeing that the plaintiff is entitled to no relief regarding the invalidity of the sale or on the score of pre-emption, we accept the appeal on the remaining point and remand the case to the District Judge for a finding on the facts alleged regarding redemption of the mortgages by the plaintiff and a decision in the light of the above remarks according to the facts found. Costs to follow the event.

R.M./R.K. Case remanded.

### A. I. R. 1919 Lahore 3 (1)

RATTIGAN, C. J. AND DUNDAS, J.

Khaira—Appellant.

v.

Salem Raj and others—Respondents.

Misc. First Appeal No. 2341 of 1917, Decided on 27th May 1919, from order of Senior Sub. Judge, Ferozepore, D/- 30th January 1917.

Provincial Insolvency Act (1907), S. 46—Sale of insolvent's property — Sale confirmed—Appeal by insolvent—Auction-purchaser is necessary party.

The auction-purchasers are necessary parties to an appeal by an insolvent against an order confirming an auction-sale of his property.

[P 3 C 1]

Where therefore the auction-purchasers were not made parties to such an appeal, and it was not until a year afterwards that an application was made to implead them:

Held: (1) that the appeal as against them was time-barred; (2) that the auction-purchasers not having been made parties in time, the appeal failed as against the other respondents also.

[P 3 C 1]

B. D. Kureshi—for Appellant.

Fakir Chand—for Respondents.

**Judgment.**—This is an appeal from the order of an insolvency Court confirming an auction sale of a house belonging to the insolvent. The appeal is by the insolvent on the ground that his house is not liable to attachment and sale. But when filing the appeal his counsel omitted to make the auction-purchasers parties to the appeal, although they were obviously necessary parties and it would be impossible to accept the appeal without calling upon them and hearing them. It was not until considerably after a year that an application was made to add them as parties, and the appeal is obviously time barred as against them. In a similar case, *Mela Ram v. Narain Das* (1), the appeal was dismissed, and we see no

(1) [1882] 189 P. R. 1882.

reason to follow any other course in the present case. The appeal is dismissed with costs.

R.M./R.K. Appeal dismissed.

### A. I. R. 1919 Lahore 3 (2)

BROADWAY, J.

Paira Mal and Sons—Plaintiffs—Applicants.

v.

Raj Narain and Co.—Defendants—Opposite Parties.

Civil Revn. No. 924 of 1918, Decided on 6th February 1919, from order of Senior Sub-Judge, Amritsar, D/- 30th August 1918.

Civil P. C. (1908), S. 10—Suits pending in different Courts—Courts must be shown to be of concurrent jurisdiction.

Before an order under S. 10 can be made the Courts in which the two suits are pending must be shown to be of concurrent jurisdiction, in the sense that the suit to be stayed could be tried by the Court in which the first suit was instituted.

[P 3 C 2]

Tirath Ram—for Applicants.

Bishan Nath—for Opposite Parties.

**Judgment.**—This is an application under S. 44, Punjab Courts Act for revision of an order passed by the Senior Subordinate Judge, Amritsar, staying the trial of a suit under S. 10, Civil P. C. The petitioners filed the suit on 20th April 1918 and the respondents asked for an order staying it on the ground that they had filed a suit in which the same questions were involved in the Court of the Munsif at Delhi on 25th March 1918.

Before an order under S. 10, Civil P. C., can be passed however it seems to me that the Courts in which the two suits are pending must be of concurrent jurisdiction, in the sense that the suit to be stayed could be tried in the Court in which the first suit was instituted: see *Gopikisan v. Padamraj* (1). It is obvious that the suit now stayed is not triable by the Munsif and the order complained of was therefore without jurisdiction. I accordingly accept this petition with costs and setting aside the order of the Senior Subordinate Judge direct that the case be proceeded with.

R.M./R.K. Application accepted.

(1) [1917] 12 N. L. R. 174=37 I. C. 510.



**A. I. R. 1919 Lahore 4 (1)**

SHADI LAL AND MARTINEAU, JJ.

*Mirza and another*—Plaintiffs—Appellants.

v.

*Kahan Singh* — Defendant—Respondent.

Second Appeal No. 2127 of 1915, Decided on 14th February 1919, from decree of Dist. Judge, Gujranwala, D/- 26th May 1915.

**Landlord and Tenant — Abandonment—Person giving up whole holding and quitting village for good—He abandons all right including rights in Shamilat—His share in Shamilat passes to cosharers.**

The fact of a person giving up the whole of this holding and quitting the village for good shows that he has abandoned all the rights he had in the village, including rights in the shamilat, and on such abandonment his share in the shamilat passes into the possession of the cosharers, and he and his descendants lose their right to it. [P 4 C 2]

*Badr-ud-Din Kureshi*—for Appellants.*Nanak Chand*—for Respondent.

**Judgment.**—Sahibzada, a landowner of Mianwal, left his village a few years before 1884, when he died, and the defendant's adoptive father got possession of his proprietary holding. A suit brought by Sahibzada's sons Khanu and Jallu in 1903 to recover the land was dismissed for default, and a suit brought after their deaths by the present plaintiffs, the heirs of Khanu and Jallu, in 1912 was also dismissed, the defendant being found to have acquired a title to the land by adverse possession. In the present case the plaintiffs sue for a declaration of their right to the share which Khanu and Jallu would have had in the shamilat deh amounting to 638 kanals. The Subordinate Judge held that the plaintiffs had not lost their rights in the shamilat, and that the claim was within time, and gave them a decree, but the District Judge on appeal has dismissed the suit being of opinion that Khanu and Jallu, having abandoned their proprietary holding, had no rights in the shamilat. The plaintiffs have appealed to this Court. There is, as the learned District Judge observes, no reported case exactly on all fours with the present one. In *Jalal v. Beli Ram* (1), to which he has referred, the original owner of the holding had been deprived of it in pre-British times, when rights in shamilat were practically non-existent, whereas in the present case

(1) [1907] 9 P. L. R. 1907=37 P. W. R. 1907.

Sahibzada abandoned his land in 1881 or thereabouts.

The question is whether Sahibzada or his sons abandoned their rights in the shamilat. There is no explicit finding of the learned District Judge on this point, but we think that it is only reasonable to conclude that there was such an abandonment, otherwise Sahibzada and his sons would have retained at least a portion of their proprietary holding. Their giving up the whole of that holding and quitting the village for good shows that they abandoned all the rights they had in the village, including rights in the shamilat. Having once abandoned their rights in the shamilat, can they or their heirs, the plaintiffs, now assert their claim to them? The trial Court has been at pains to show that that portion of the shamilat which is in the defendant's possession and for which he pays the revenue is not identical with that which was held by Khanu and Jallu but this fact is not material. The case relates not to property of which Khanu and Jallu were the sole owners, but to their undivided share in land which belonged jointly to the proprietors of the village. On the abandonment by Khanu and Jallu or their father of their share in the shamilat that share must be deemed to have passed into the possession of the cosharers and that being so, the plaintiffs have lost their right to it. The claim therefore fails and we dismiss the appeal with costs.

R.M./R.K.

*Appeal dismissed.***A. I. R. 1919 Lahore 4 (2)**

ABDUL RAOOF, J.

*Mt. Haur Kaur*—Plaintiff — Petitioner.

v.

*Munni Lal*—Deft.—Opposite Party.

Civil Revn. No. 25 of 1919, Decided on 24th March 1919.

**(a) Civil P. C. (1908), O. 33, R. 5 (d)—Application for leave to sue—Court has power to decide question of limitation.**

Where an application is made for leave to sue in forma pauperis, the Court making an enquiry into the alleged pauperism of the applicant has power to decide the question of limitation and decide whether the plaintiff has or has not a subsisting cause of action. [P 5 C 1]

**(b) Civil P. C. (1908), S. 115—Revision—Power of interference.**

The High Court has no power to interfere in revision with the decision of a Court which had jurisdiction to deal with the matter. [P 5 C 1]



*Harbhagwan Das*—for Petitioner.

*Tek Chand*—for Opposite Party.

**Judgment.**—The order under revision was passed under Cl. (d), R. 5, O. 33, Civil P. C. The learned Subordinate Judge held that although the petitioner was a pauper, she had no subsisting cause of action, her suit being barred by limitation. For a decision on this point the learned Subordinate Judge took into consideration such materials as were on the record before him. He took into consideration the statements in the petition of plaint and the deposition of the plaintiff made in Court. The counsel for the petitioner has urged before me that the learned Subordinate Judge had no power to deal with the question of limitation because that was a question which related to the merits of the case. This contention is opposed to decided cases. It has been held that the Court has power to decide the question of limitation and decide whether the plaintiff has or has not a subsisting cause of action. This question was decided by a Full Bench of the Allahabad High Court in the case of *Chattarpal Singh v. Raja Ram* (1). Having regard to this decision, it cannot be said that the learned Subordinate Judge had no jurisdiction to decide the case in the manner he did. According to the rulings of their Lordships of the Privy Council, this Court has no power to interfere with the decision of a Court which had jurisdiction to deal with the matter. The view taken by the learned Subordinate Judge may be erroneous on the question of limitation, but I have no power to interfere with it. Under these circumstances the application for revision fails and I dismiss it with costs.

R.M./R.K. *Petition dismissed.*

(1) [1885] 7 All. 661 (F. B.).

### A. I. R. 1919 Lahore 5

RATTIGAN, C. J. AND MARTINEAU, J.

*Nihal and others*—Plaintiffs—Appellants.

v.

*Shib Sant Kumar*—Defendant—Respondent.

Second Appeal No. 1953 of 1915, Decided on 1st February 1919, from decree of Dist. Judge, Jhang, D/- 10th May 1915.

Transfer of Property Act (1882), S. 60—Postponement of redemption—Terms unconscionable—Mortgagor cannot sue for redemption

before expiry of period fixed unless he proves undue influence.

Where a mortgage deed provides that redemption shall not take place before the expiry of a term of years, the fact that the terms of the deed are unconscionable will not entitle the mortgagor to avoid the contract and sue for redemption before the expiry of that period, unless he is able to prove that the contract was entered into under undue influence. [P 5 C 2]

*Nanak Chand*—for Appellants.

*Bahadur Chand*—for Respondent.

**Judgment.**—The plaintiffs have sued for redemption of land which was mortgaged for Rs. 2,500 to Bawa Shamsher Nath of whom the defendant is a chela. in 1881. The deed recites that the mortgage is for a period of 40 years, and that on Rs. 1,000 out of the mortgage money interest will be payable at the rate of 2 per cent. per mensem. The plaintiffs alleged that the terms of the mortgage had been entered in the deed in consequence of undue influence exercised by the mortgagee. Their suit has been dismissed, the Courts below concurring in holding that undue influence has not been proved and that the suit is premature. The plaintiffs have filed a second appeal in this Court, and it is contended on their behalf that the terms of the mortgage deed are unconscionable and that the stipulation that the land could not be redeemed for 40 years should not be held binding. Assuming however that the terms are unconscionable, this fact alone will not entitle the plaintiffs to avoid the contract and sue for redemption before the expiry of the period entered in the deed. Equitable considerations will not avail them, as is clear from the recent ruling of the Privy Council reported as *Balla Mal v. Ahad Shah* (1), but in order to succeed they have to prove that the contract was entered into under undue influence. As this has not been proved their case fails, the suit being clearly premature.

We express no opinion as to whether in a suit for redemption brought after the expiry of the period of 40 years, the plaintiffs would be entitled to a reduction in the amount of interest on the ground that the equity of redemption has been clogged. We dismiss the appeal with costs.

R.M./R.K. *Appeal dismissed.*

(1) A. I. R. 1918 P. C. 249=48 I. C. 1=124 P. R. 1918 (P. C.).



## A. I. R. 1919 Lahore 6

PETMAN, J.

*Jawand Singh and others*—Defendants—Appellants.

v.

*Mahomed Din and others*—Plaintiffs—Respondents.

Second Appeal No. 2936 of 1918, Decided on 7th June 1919, from decree of Dist. Judge Amritsar, D/- 31st May 1918.

(a) **Specific Relief Act (1877), S. 55—Nuisance—Mere noise is sufficient cause to grant injunction.**

Mere noise alone, on a proper case of nuisance being made out, is a sufficient ground for an injunction. [P 7 C 2]

(b) **Specific Relief Act (1 of 1877), S. 55—Injunction—Exercise of right in excess causing nuisance—Nuisance cannot be abated without obstruction of enjoyment—Exercise of right may be entirely stopped.**

When a man, who is entitled to a limited right, exercises it in excess so as to produce a nuisance and the nuisance cannot be abated without obstructing the enjoyment of the right altogether, the exercise of the right may be entirely stopped until means have been taken to reduce it altogether within its proper limits. [P 7 C 2]

(c) **Specific Relief Act (1877), S. 55—Injunction—Act of several persons constituting nuisance—Injunction to restrain all can be granted.**

The acts of two or more persons may, taken together, constitute such a nuisance that the Court will restrain all from doing acts constituting the nuisance, although the annoyance occasioned by the acts of any one of them, if taken alone, would not amount to a nuisance. [P 7 C 2]

(d) **Specific Relief Act (1877), S. 55—Injunction—Calling of azan—Disturbance by blowing of conches or beating of drums by several persons—Disturbance malicious with sole purpose of annoyance—Acts of all constituting nuisance—Right to call out azan being inherent right permanent injunction was granted.**

Plaintiffs sued for the issue of a perpetual injunction restraining defendants from preventing plaintiffs from calling out the azan and praying in their mosque. It appeared that the defendants created noises and disturbances at the time of the calling out of the azan and at the time of the subsequent prayers, and the Court found that it was done maliciously with the sole purpose of annoying and obstructing the plaintiffs in their religious observances and ceremonies.

**Held:** (1) that the defendants did not have an unlimited right to blow conches or beat drums, nor could each of them plead that the little noise created by him personally did not amount to a nuisance. [P 7 C 2]

(2) that the plaintiffs had an inherent right to call out the azan from the mosque; [P 7 C 1]

(3) that the plaintiffs were entitled to obtain an injunction: *Christie v. Davey*, (1893) 1 Ch. 316, *Foll.* [P 8 C 2]

*Balwant Rai for Tek Chand*—for Appellants.

*Khalifa Shuja-ud-Din for Abdul Rashid*—for Respondents.

**Judgment.**—Several questions of interest and possibly of importance to the Mahomedan community arise in this second appeal and although the facts found are such that it is reasonable to suppose that owing to religious antagonism between Hindus and Mahomedans similar occurrences have taken place in the past, there are apparently no published Indian decisions directly in point. The facts necessary to be stated are that in a village occupied by about 600 Hindus and a little over 100 Mahomedans there are two mosques, one unconnected with the present case, is situate just outside the abadi; and the other, with which the case is concerned, is an ancient building erected about 200 years ago inside the village. It appears that the ancient mosque fell out of repair and in recent years has been repaired and was used as a school and for other semi-religious purposes, but more recently it was used for prayers. The Hindus objected to the calling out of the azan; a serious riot took place between the Hindus and Mahomedans and criminal proceedings were instituted, but on the intervention of the District Magistrate, the dispute was ended, for the time being, by a compromise, to which two of the present plaintiffs were parties, whereby it was agreed that the Mahomedans should pray in the ancient mosque but that there should be no calling out of the azan. This agreement, whether for good reasons or not, has not been observed by the Mahomedans, with the result that the defendants appellants and other Hindus blew conches, beat drums and generally created noises and disturbances at the time of the calling out of the azan and at the time of the subsequent prayers. Three of the Mahomedans instituted a suit for an injunction against the defendants restraining them from interfering with the calling out of the azan and praying in the ancient mosque. The Hindus denied that the building was a mosque and that the plaintiffs had any right to pray there, and it was also denied that they had interfered with the exercise of religious ceremonies by the plaintiffs. The first Court granted the injunction and the lower appellate Court held that the build-



ing continued to retain its character as a mosque, that the defendants had taken part in preventing the use of the building as a mosque and more particularly as regards the calling out of the azan, that the conches had not been blown in connexion with any religious ceremony of the Hindus, that the acts complained of had been committed solely for the purpose of stopping the call of the azan, and that the defendants were not entitled to create a disturbance while the azan was being called out, by acts of the nature complained of and therefore dismissed the appeal.

On behalf of the appellants it is contended that the compromise made by the Mahomedans bars the present suit, but it is unnecessary to discuss the effect of that compromise, because Mahomed Bakhsh, one of the plaintiffs, was no party to the compromise, and it is not shown, or argued, that such an arrangement has any binding legal effect. The next contention is that the plaintiffs have no inherent right to have the azan called out and that the exercise of that right for two years only is not sufficient to create the right. It was suggested that 20 years might be considered sufficient to create the right by way of an easement, and it was pointed out that the Hindu defendants had brought no suit to restrain the calling out of the azan. I do not think this argument can be taken seriously. It must be conceded that there is an inherent right to call out the azan from a mosque. It has nothing to do with the subject of easements. It has not been claimed or urged that the calling is itself a nuisance and it is obvious that the objection of the Hindus is not to the noise of the call but to its subject-matter. Apart from a mosque, any person has the right to call out from his property provided that the noise he makes does not become a nuisance by reason of its continuity and that the subject-matter of the call does not constitute an offence.

It is clear that the conches were not blown at a temple or gurdwara in pursuance of any religious ceremony, and that the noises were maliciously made at the times of calling out of the azan for the sole purpose of frustrating the object of the call as found by the lower appellate Court, and the real point for consideration is whether the acts men-

tioned constitute a nuisance and, if so, whether the plaintiffs are entitled to the injunction prayed for. Counsel have cited no authority on the subject. As pointed out in *Kerr on Injunctions*, 5th Edn. p. 203, the proposition that mere noise alone will on a proper case of nuisance being made out, be a sufficient ground for an injunction, is well established. The inconvenience caused is not one of a trifling nature of which no reasonable man should complain, nor is the nuisance one of a temporary or occasional character. Though it may be said that the blowing of conches, or beating of drums on isolated occasions of the calling out of the azan would not amount to such a nuisance as would necessitate the interference of a Court by injunction, yet by their continuance and constant repetition, a sufficiently substantial case for such interference would be made out. There is every likelihood of their continuance. Again, as pointed out in *Kerr on Injunctions*, p. 156, when a man who is entitled to a limited right exercises it in excess so as to produce a nuisance and the nuisance cannot be abated without obstructing the enjoyment of the right altogether, the exercise of the right may be entirely stopped until means have been taken to reduce it altogether within its proper limits. The Hindu defendants have not an unlimited right to blow conches and beat drums as claimed by them in this Court. Nor can each of them plead that the little noise made by him personally at only one time of the day, or even at intervals of days, but at the time of the calling out of the azan does not amount to a nuisance. The defendants had a common intention, and *Lambton v. Mellish* (1) is an authority for holding that the acts of two or more persons may, taken together, constitute such a nuisance that the Court will restrain all from doing acts constituting the nuisance although the annoyance occasioned by the acts of any one of them, if taken alone, would not amount to a nuisance. That case related to the nuisance caused by a number of barrel organs.

It has been established, by a current of the highest English authorities, "that what makes life less comfortable and causes sensible discomfort and annoyance is a proper subject for injunction,"

(1) [1894] 3 Ch. 163.



whilst certain decisions show that an injunction may be issued even where the defendant had acted reasonably. Such a case is *Broder v. Saillard* (2), where it is explained that it is no answer to say that the defendant is only making a reasonable use of his own property and the law is stated as follows:

"I take it the law is this, that a man is entitled to the comfortable enjoyment of his dwelling house. If his neighbour makes such a noise as to interfere with the ordinary use and enjoyment of his dwelling-house, so as to cause serious annoyance and disturbance, the occupier of the dwelling-house is entitled to be protected from it."

The present case is a much stronger one for the issue of an injunction, because the nuisance caused by the Hindu defendants is not a reasonable exercise of their rights. Their actions break what Lord Bramwell has called "the rule of give and take; live and let live."

The judgment in *Christie v. Davey* (3) is I think very pertinent in the present case. In that case a teacher of music, living in a house, gave lessons in music extending over seventeen hours in a week; there was, also in the same house, practising on the piano and violin and singing and musical entertainments sometimes extended to 11 at night. These facts were held not to constitute a legal nuisance of which the occupier of the adjoining house was entitled to complain, but an injunction was granted to restrain the occupier of the adjoining house, who had asserted, as the defendants assert here, that he had a perfect right to make the noises complained of, from causing any sounds or noises in his houses to vex or annoy the occupier of the first house, the Court being satisfied that he had been making noises on musical instruments and otherwise maliciously for the purpose of annoying the occupier of the first house. A similar state of things exists in the present case. The acts of the Mahomedans objected to by the Hindus do not constitute a legal nuisance of which they can rightly complain, whilst the acts of the Hindus are maliciously done for the sole purpose of annoying and obstructing the Mahomedans in their religious observances and ceremonies.

The powers of the Courts in India under the Specific Relief Act are no less

than the powers of the Courts in England whilst in some respects such powers are wider. I hold therefore that the plaintiffs-respondents are entitled to an injunction to restrain the defendants-appellants from committing the nuisance complained of. I am however not satisfied with the form of the injunction granted by the lower Courts, which is that the defendants do not henceforth prevent the plaintiffs from using the building in suit as a mosque and from praying therein and from calling out of the azan therein and I will amend the same.

For the above reasons I dismiss the appeal on the merits with costs, but technically accept the same and amend the decree of the lower appellate Court by granting the plaintiffs an injunction restraining the defendants from blowing conches, beating drums and otherwise making noises which interfere with, or interrupt, the use of the mosque by the plaintiffs as a place of worship according to Mahomedan usage or custom, including the calling out of the azan, but this injunction shall not restrain the defendants from such acts when done in connexion with their own religious ceremonies, social event or other necessary temporary causes and when the time is not maliciously and intentionally selected to clash with the religious observances and worship of the plaintiffs at the said mosque though in fact such acts may, on occasions interrupt or interfere with such observances and worship.

R.M./R.K. *Appeal dismissed.*

### A. I. R. 1919 Lahore 8

MARTINEAU, J.

*Lahore Spinning and Weaving Mills Co. Ltd.*—Plaintiffs—Appellants.

v.

*Uttam Chand*—Defendant—Respondent.

Misc. First Appeal No. 2508 of 1918, Decided on 21st February 1918, from order of Senior Sub-Judge, Amritsar, D/- 13th June 1918.

Registration Act (16 of 1908), S. 17 (1) (b)—Security bond executed in compliance with Court's order—Immovable property of value of more than Rs. 100 hypothecated—Registration is necessary.

Where execution of a decree is stayed conditionally on the judgment-debtor's furnishing security and the security bond executed hypothecates immovable property exceeding Rs. 100 in value, the bond requires registration under S. 17 (1) (b). [P 9 C 1, 2]

(2) [1876] 2 Ch. D. 692.

(3) [1893] 1 Ch. 316.



*Dalip Singh*—for Appellant.

*Nanak Chand*—for Respondent.

**Judgment.**—An order was passed by this Court staying execution of a decree of the Senior Subordinate Judge of Amritsar, from which an appeal is pending conditionally on the judgment-debtors furnishing security. A security bond has been executed, and the executing Court has accepted it. It has not been registered, and the question raised is whether, as the property hypothecated exceeds Rs. 100 in value, the bond requires registration under S. 17 (1) (b), Registration Act. The Senior Subordinate Judge holds that registration is not necessary, as the security is furnished under orders of the Court and will practically become part of the order of the Court. He regards the bond as being a petition to the Court. The decree-holders have appealed, and their learned counsel has referred to *Nagruru Sambayya v. Tangatur Subbayya* (1), in which it was held that such a security bond is compulsorily registrable under S. 17, Registration Act. The bond clearly requires registration, unless it can be regarded as an order of the Court, falling under S. 17 (2) (vi) of the Act.

I cannot agree with the lower Court that the document is in any sense a petition. It contains no request for anything to be done, and is nothing but a security bond. It also appears to stand on a different footing from a compromise which, in so far as it is submitted to, and judicially acted upon by, the Court is a step of judicial procedure not requiring registration. A compromise submitted to the Court has to be followed by a decree, but a security bond requires no order of the Court to render it effectual. The Court's acceptance of the bond given by the judgment-debtors merely indicates, as has been pointed out by the Madras High Court in the case mentioned above, that the Court considers the security sufficient, and does not give validity to the bond. Nor can the bond be treated as a part of the order of this Court directing execution to be stayed on the judgment-debtor's furnishing security. It was executed in compliance with, or in consequence of, that order, and is something distinct from the order itself. I agree therefore with the view taken in the Madras case, and hold that

(1) [1908] 91 Mad. 830.

the security bond requires registration. I accept the appeal and direct the lower Court to require the judgment-debtors to execute a fresh security bond and have it registered. The parties will pay their own costs.

R.M./R.K.

*Appeal accepted.*

### A. I. R. 1919 Lahore 9

SCOTT SMITH AND BROADWAY, JJ.

*Chhajju and others*—Defendants—Appellants.

v.

*Dallu and another*—Plaintiffs—Respondents.

Second Appeal No. 2413 of 1915, Decided on 31st March 1919, from order of Dist. Judge, Karnal, D/- 3rd May 1915.

Punjab Land Revenue Act (17 of 1887), Ss. 116, 117 and 158 (17)—Jurisdiction—Partition of common land effected by revenue authorities—Declaratory suit to render partition inoperative on ground of inaccuracy of measure of rights adopted by Revenue Authorities—Question of measure of right being one of title, suit is cognizable by civil Court.

Where certain persons sue for a declaration that a partition of common land in a village effected by the revenue authorities should be declared inoperative so far as their interests are concerned, and the claim is based on the ground that the measure of right adopted by the revenue authorities was inaccurate, the question of the measure of right is one of title within the meaning of Ss. 116, 117 and 158, Cl. (17), and the suit is therefore cognizable by a civil Court.

[P 10 C 1]

*Beni Pershad Khosla and Gobind Ram*—for Appellants.

*Gullu Ram*—for Respondents.

**Judgment.**—The suit out of which this appeal has arisen was instituted by the plaintiffs-respondents, and in it they sought for a declaration that a certain partition of common land in village Gianpure, which had been effected by the revenue authorities, should be declared inoperative so far as their interests were concerned. The primary Court held that the suit was one cognizable by the Revenue Courts alone and for that reason dismissed it. On appeal the lower appellate Court in a very short order held that the suit was one cognizable by the civil Courts and directed that the suit should proceed and be disposed of on its merits. Against this order of the learned District Judge the defendants-appellants have preferred this appeal, and we have heard Mr. Beni Pershad Khosla on their behalf and Mr. Gullu Ram for the plaintiffs-respondents.



The point for determination is whether the civil or Revenue Courts have jurisdiction to try the suit. Partition has been effected in accordance with the khewat of the settlement of 1880, and the plaintiffs-respondents' claim is that the partition should have been according to the khewat of the settlement of 1909. The khewats in question are different and the measure of right in each case varies. The question of the measure of right is clearly one of title within the meaning of S. 116 and 117, Punjab Land Revenue Act, as was held in *Fazaldad Khan v. Ata Muhammad* (1). The suit was therefore cognizable by and within the jurisdiction of the civil Courts. Mr. Beni Pershad urged however that the fact that the partition had actually been completed ousted the jurisdiction of the civil Courts. We are unable to accede to this contention, which is opposed to *Bachan Singh v. Madhan Singh* (2) and *Anwar v. Allah Yar* (3). In our opinion the view taken by the learned District Judge is correct and we therefore dismiss the appeal with costs.

R.M./R.K. *Appeal dismissed.*

(1) [1905] 99 P. R. 1905.

(2) [1897] 61 P. R. 1897 (F. B.).

(3) [1912] 28 P. R. 1913=16 I. C. 967.

### A. I. R. 1919 Lahore 10

SCOTT-SMITH, J.

*Hira and another*—Plaintiffs—Appellants.

v.

*Bansi Lal and another*—Defendants—Respondents.

Second Appeal No. 1708 of 1918, Decided on 28th January 1919, from decree of Dist. Judge, Karnal, D/- 5th March 1918.

**Pre-emption — Suit for—Priority between pre-emptor and vendee—Question must be decided with relation to state of things existing at time of sale and not at any later period.**

The question of priority as between a pre-emptor and the vendee must be decided with relation to the state of things existing at the time of the sale, and not at any later period. Thus, where a vendee at the time of a sale is a cosharer in the land purchased by him by virtue of a previous sale and has therefore a right of pre-emption, that right cannot be affected by the fact that the sons of the vendor in the previous sale subsequently sue and avoid that sale. [P 11 C 1]

*R. Obbard*—for Appellants.

*H. A. Herbert and Anant Ram*—for Respondents.

**Judgment.**—This suit by the plaintiffs-appellants for pre-emption has been

dismissed by the lower Courts on the ground that their right to pre-empt the land in suit is not superior to that of the vendee, the latter being a cosharer in the land in suit at the time of the sale. The plaintiffs have filed a second appeal to this Court, on the ground that at the time when they brought their suit the share owned by the vendee in the joint holding, in virtue of which he had a right of pre-emption, had passed out of his hands owing to a decree of Court. The facts briefly are as follows:

Bansi Lal, vendee-defendant-respondent, bought some land on 4th July 1913, from Mt. Bakhtawari in her capacity as guardian of her minor sons. The land in suit, which is in the same holding as that bought by Bansi Lal, was sold to him on 28th May 1916. On 16th July 1917, the minor sons of Mt. Bakhtawari brought a suit for possession of the land sold to Bansi Lal on 4th July 1913, on the ground that their mother had no right to make the sale and that it was not for their benefit. On 21st March 1917, they were given a decree to the effect that they should get possession of the land on payment of Rs. 175, which was held to be a valid charge thereon. The plaintiffs brought the present suit on 26th March 1917, i.e., after it had been held that the sale to Bansi Lal of 4th July 1913 was not a valid one. Mr. Obbard on behalf of the appellants relies on *Kehr Singh v. Mahaman Singh* (1), in which it was held that the vendee, who by reason of a prior purchase had become a landholder in the village, and as such was competent to resist the claim of a pre-emptor with respect to a subsequent purchase, cannot, if in a pre-emption suit he loses the first bargain, retain the subject-matter of the second bargain. Mr. Obbard argues that the same principle should be applied here. The vendee having lost the land which he obtained by the first bargain cannot, it is alleged, retain the subject-matter of the second bargain. Mr. Herbert on behalf of the respondent contends that that case is distinguishable. He points out that the decision in *Kehr Singh v. Mahaman Singh* (1) was based upon a ruling, *Bhuya v. Kori Mal* (2), from which a quotation will be found at p. 143 of the Punjab Record of 1908: *Kehr Singh v. Mahaman Singh* (1). At

(1) [1908] 25 P. R. 1908.

(2) [1893] 30 P. R. 1893.



the bottom of this page the following passage occurs:

"I think the effect of a pre-emption decree is to vest the proprietary right in the pre-emptor from the date of the sale, which was a transaction voidable at the option of the pre-emptor. When the option is exercised, the sale as regards the original purchaser becomes void ab initio."

Mr. Herbert argues that the sale by Mt. Bakhtawari to Bansi Lal was not void ab initio, but was only voidable at the instance of her minor sons and that it was a good sale until it was set aside by them, i.e., until the date of the decree, viz., 21st March 1917. Mr. Herbert also referred to numerous passages in *Sanwal Das v. Gur Parshad* (3) and *Dhanna Singh v. Gurbakhsh Singh* (4), in which it was laid down that the question of priority as between the pre-emptor and the vendee must be decided in advertence to the state of things existing at the time of sale and not at any later period: see *Sanwal Das v. Gur Parshad* (3) p. 431 of P. R. 1909, penultimate paragraph, see also p. 447 (of P. R. 1909), where the following passage occurs:

"We have a perfectly clear position if we look to the date of sale, and to that alone, as determining the rights of the parties:"

see also p. 453 (P. R. 1909) where the following passage occurs:

"Under the Punjab Pre-emption Act, a pre-emptor's cause of action arises when a sale is made in violation of his rights, and it appears to me that in all cases in which a cause of action is well founded under the Act, with reference to the state of things which existed at the time of sale, that cause of action, viewed as a valid ground of claim, cannot be lost or affected by reason of a new circumstance coming into existence after the sale."

There are other similar passages in this ruling, but it is unnecessary to quote any more of them. It is therefore well established that the question of priority as between the pre-emptor and the vendee must be decided with relation to the state of things existing at the time of sale and not at any later period. Applying the principle to the present case we find that the vendee at the time of the sale in dispute was a cosharer in the land sold, and therefore had a right of pre-emption. This right of his cannot be affected by the fact that subsequently the minors sued and avoided the sale in virtue of which he had a right of pre-emption. The case reported as *Kehr Singh v. Mahman Singh* (1), is certainly distinguishable, in which the vendee lost the land, under

which he claimed, by reason of a pre-emption suit by which the pre-emptor was substituted for him as from the date of the original sale. Even if this decision be considered as opposed to the principle subsequently enunciated in *Sanwal Das v. Gur Parshad* (3), I am not prepared to hold that the ratio decidendi should be applied in the present case.

As pointed out by Robertson, J., at p. 376 (of P. R. 1909) [*Sanwal Das v. Gur Parshad* (3)]

"A right of pre-emption is not one which is to be held sacrosanct and if we are to lean one way or the other—other things being equal—we should lean rather against the interference with the general rights of free contract by a vendor than in favour of such interference on a claim set up by a plaintiff."

I am therefore of opinion that the decision of the Courts below is correct and I dismiss the appeal with costs.

R.M./R.K.

*Appeal dismissed.*

## A. I. R. 1919 Lahore 11

CHEVIS, J.

*Chuni Lal*—Petitioner.

vs.

*Roshan Lal*—Opposite Party.

Civil Revn. No: 564 of 1918, Decided on 18th February 1919, from order of Sub-Judge, 1st Class, Lahore, D/- 18-6-1918.

Civil P. C. (1908), O. 7, R. 11, (b)—Order requiring payment of deficit court-fee on plaint—Order final—Neither appeal nor revision lies—Court-fees Act (7 of 1870), S. 12.

Where a Court calls on a plaintiff to make up the court-fee on his plaint and the plaintiff contends that the fee already paid is sufficient, the High Court will not interfere with the order in revision. It is for the plaintiff to make up his mind whether he will comply with the Court's order or not. If he does not comply, his plaint will be rejected. Then unless the trial Court's order is final under S. 12, court-fees Act, the plaintiff will have a right of appeal. If the order is final, neither an appeal nor revision will be competent. [P 11 C 2, P 12 C 1]

*Tirath Ram*—for Petitioner.

**Judgment.**—This is an application for revision of an order calling on plaintiff to make up court-fee on his plaint. Plaintiff's contention is that the fee already filed is sufficient. I do not consider that I should interfere on revision. It is for plaintiff to make up his mind whether he will comply with the Court's order or not. If he does not comply, then his plaint will be rejected. Then, unless it is a case of the first Court's order as to the amount of stamp required being final by virtue of S. 12 of the Court Fees Act, the plaintiff will have a right

(3) [1909] 90 P. R. 1909=4 I. C. 179.

(4) [1909] 91 P. R. 1909=4 I. C. 387.



of appeal. If the first Court's decision on the point is final, then of course no appellate Court can upset it, and I do not consider that a decision which is declared by law to be final should be attacked in revision any more than in appeal.

R.M./R.K. *Petition dismissed.*

### A. I. R. 1919 Lahore 12

SHADI LAL AND MARTINEAU, JJ.

*Shadi*—Plaintiff—Appellant.

v.

*Abdur Rahman* and *others*—Defendants—Respondents.

Second Appeal No. 86 of 1916, Decided on 30th May 1919, from decree of Dist. Judge, Jullundur, D/- 30th November 1915.

**Limitation Act (1908), Arts. 134 and 144—Suit for joint possession by trustee against co-trustee and his alienee—Art. 134 applies.**

A suit for joint possession of trust property brought by a trustee against a co-trustee, who has alienated the trust property and the person to whom it has been alienated is governed by the 12 years' rule of limitation and the article applicable thereto is Art. 134. [P 13 C 1]

*Rafi* and *Ghulam Rasul*—for Appellant.

*Niaz Muhammad*—for Respondents.

**Judgment.**—On 5th March 1907, Mt. Hajran, one of the six Muja-wars of the Khankah known as Khankah Punj Pir Sahib in the Jullundur City, effected a mortgage with possession of a plot of open site said to belong to the said Khankah. On 18th March 1913 the plaintiff, who too claims to be a Muja-war of the institution, brought the present action for the joint possession of the property, alleging that the site was a part of the trust property, that the trustee had no authority to alienate it, and that the plaintiff along with the other trustees was entitled to the possession thereof.

The Court of first instance decreed the claim, but the learned District Judge has dismissed it, holding that the suit is governed by Art. 120, Limitation Act, and that as it was not brought within six years from the date of the alienation, it was barred by time. Now we may say at once that we are not at present called upon to adjudicate upon the question whether the property is, as alleged by the plaintiff, trust property and upon the further question whether he is entitled to the joint possession thereof. Neither of these matters has been deter-

mined by the lower appellate Court. The sole issue before us is whether the claim as laid in the plaint is barred by limitation.

The principle of law has been repeatedly affirmed in a series of judgments that a suit by a worshipper of a religious institution for a declaration that an alienation made by the trustee thereof is void, and that the alienee be ejected from the property transferred to him is governed by Art. 120, *vide inter alia*, *Asa Ram v. Paras Ram* (1). Further, there is a perfect unanimity of opinion upon the subject that if a trustee of a religious institution improperly alienates for value the trust property the limitation applicable to a suit brought by his successor against the alienee to recover the property for and on behalf of the trust, that is to say, for restoring it to the trust, is that prescribed by Art. 134 and the terminus a quo is not the date when the successor succeeds to the office but the date of the alienation: *vide Har Gian Deo v. Baldeo Das* (2), *Sajedur Raja Chowdhuri v. Gour Mohun Das* (3) and *Sagun Balkrishnashet v. Kaji Husen* (4). The question arises what provision of the Limitation Act governs an action like the present brought by a trustee against his co-trustee, who has alienated the property and the person to whom it has been alienated. It must be remembered that the suit is one for joint possession of the property, and we fail to understand how it can be treated as a suit for a declaration or for ejectment. The plaintiff asserts that the trust property was in joint possession of all the trustees, and that one of them has in violation of the trust transferred a part of the trust property and has thus deprived the plaintiff of the joint possession thereof. The plaintiff consequently asks the Court to restore him to the joint possession of which he has been deprived wrongfully.

Now the plaintiff may or may not be able to establish these allegations of facts or his right to joint possession. But the claim, as set out above, is not governed by Art. 120. Indeed, Mr. Niaz Muhammad for the respondents is unable to cite any authority in support of the view

(1) [1904] 9 P. R. 1904.

(2) [1908] 167 P. R. 1908 (F.B.).

(3) [1897] 24 Cal. 418.

(4) [1903] 27 Bom. 500.



taken by the learned District Judge, and ask us to hold that the property has not been established to be trust property. This is, as stated above, a matter to be determined by the District Judge. Having regard to the nature of the claim as described in the plaint, we are of opinion that the action is governed by the 12 years' rule of limitation, and it is unnecessary to determine whether it is Art. 134 or Art. 144 which is applicable to it though as at present advised, we are inclined to think that it comes within the purview of the former article. The suit is in either case, within time. We accordingly accept the appeal, and setting aside the decree of the lower appellate Court remand the case for decision on the merits. The court-fee on the memorandum of appeal shall be refunded, and other costs shall abide the event.

R.M./R.K.

*Appeal accepted.***A. I. R. 1919 Lahore 13**

ABDUL RAOOF, J.

*Parma Ram*—Judgment-debtor—Appellant.

v.

*Lehna Singh*—Decree-holder—Respondent.

Misc. Second Appeal No. 3184 of 1918, Decided on 25th March 1919, from order of Dist. Judge, Multan, D/- 21st August 1918.

Civil P.C. (1908), S. 47 and O. 21, R. 2(3)—Payment or adjustment of decree out of Court—Executing Court cannot investigate fact of payment under S. 47.

It is not open to an executing Court to investigate in execution proceedings the fact of receipt of the decretal amount or of an adjustment of the decree out of Court. By reason of the special provision of the law contained in O. 21, R. 2 (3), the determination of this question has been taken out of the purview of S. 47.

[P 14 C 1]

*Hargopal*—for Appellant.*Durga Das*—for Respondent.

**Judgment.**—This appeal arises out of proceedings in execution of a decree. The facts are simple. One Lehna Singh obtained a decree for an aggregate sum of Rs. 1,671-11-5 on 7th October 1915 against the appellant Parma Ram. The first application for execution was made on 17th January 1916. Certain property was attached in execution of that decree. On 20th December 1917 the present application was made, when the decree-holder admitted part payment of the

decree to the extent of Rs. 1,240 and applied for the execution of the decree for the recovery of the sum of Rupees 438-11-5 including costs of the execution. Notice was issued to the judgment-debtor, and he appeared on 25th January 1918 and produced a receipt dated 21st February 1916 for a sum of Rs. 1,677 executed by the decree-holder Lehna Singh in his favour, alleging that the whole amount of the decree had been paid out of Court and the matter had been adjusted between him and the decree-holder. The Court executing the decree, namely, the Subordinate Judge of Multan, recognized this alleged payment and relying upon the receipt that was produced in Court, held that the matter had been adjusted between the parties and that it was not open to the decree-holder to go behind it and claim any sum under the decree.

The decree-holder preferred an appeal from the order of the Subordinate Judge. The lower appellate Court has taken a different view. It has held that looking to the clear provision of the law contained in Cl. (3), R. 2, O. 21, the Court executing the decree could not have recognized the payment or the adjustment relied upon by the judgment-debtor. The learned Judge of the lower appellate Court has written a very careful and exhaustive judgment. He has looked into all the cases relied upon by the pleaders of the respective parties and has come to the conclusion that the authorities in favour of the proposition, that it is not open to an executing Court to recognise a payment or adjustment not certified according to the rules laid down under the Code are numerous. There are only two cases decided by the Bombay High Court which to a certain extent go against this proposition. Taking this view the learned Judge of the Court below set aside the order of the Court of first instance and held that the decree-holder was entitled to execute this decree.

The judgment-debtor has come up in second appeal to this Court, and the learned pleader who has appeared in support of the appeal has for the most part relied upon the decisions of the Bombay High Court reported as *Trimback Ramkrishna v. Hari Laxman* (1) and *Hansa Godhoji v. Bhawa Jogaji* (2). He has

(1) [1910] 34 Bom. 575=7 I. C. 940.

(2) [1916] 40 Bom. 393=33 I. C. 232.



argued that the view taken by the learned Judge of the Court below on the question of limitation relating to an application under Cl. (2), R. 2, is entirely erroneous, inasmuch as it was only by way of a defence that the question of the adjustment and payment was brought forward before the Court. He has however argued that the objection of the judgment-debtor may be looked upon as an application required under Cl. (2), R. 2. These arguments are contradictory. If his objections are to be treated as an application informing the Court that an adjustment had taken place under Cl (2), R. 2 then it certainly is governed by Art. 174, Lim. Act. It is needless for me to go into the matter in any detail. The question is not one of first impression but is covered by a number of authorities of different High Courts. In the case reported as *Mathar Dravia v. Subramania Pillai* (3) the matter has been fully considered by the Madras High Court. The same Court in *Alathoor Badrudeen v. Gulam Mohideen* (4) held a similar view and dissented from the ruling reported as *Trimback Ramkrishna v. Hari Laxman* (1), to which I have already referred. The learned counsel for the decree-holder has also relied upon a very recent decision of the Calcutta High Court reported as *Jogendra Prosad v. Asutosh Goswami* (5). It is very clearly laid down there that it is not open to an executing Court to investigate the fact of receipt of the decretal amount or of the adjustment of the decree out of Court in the execution proceedings. The learned Judges in that case also clearly decided the question that by reason of the special provision of the law the determination of this question had been taken out of the purview of S. 47, Civil P. C. In my opinion the view taken by the learned Judge of the Court below was correct, and I must dismiss the appeal which I do hereby with costs.

R.M./R.K.

*Appeal dismissed.*

(3) [1917] 40 I. C. 889.

(4) [1911] 36 Mad. 357=12 I. C. 562.

(5) [1917] 37 I. C. 738.

**A. I. R. 1919 Lahore 14**

MARTINEAU, J.

*Bhag Mal-Saddu Ram* — Plaintiff — Appellant.

v.

*Walia*—Defendant—Respondent.

Second Appeal No. 2757 of 1818, Decided on 10th March 1919, from decree of Dist. Judge, Lyallpur, D/- 13th May 1918.

(a) Contract Act (1872), S. 45—One creditor paid his share—Other creditors can sue for balance.

Section 45 does not provide that when one of several joint creditors has been paid his share of the debt and has thus ceased to be a creditor, the remaining creditors cannot maintain a suit for the balance of the debt. [P 15 C 2]

(b) Contract Act (1872), S. 45—Debt due to several persons—Decree obtained by one creditor in respect of his share — Suit by others for balance is maintainable.

The words "as between him and them" in S. 45 signify that as between the debtor and the original body of creditors the right to claim payment would rest with that body, but if by part payment the number of creditors is reduced, the right to claim payment will be a right arising as between the debtor and the remaining creditors. [P 15 C 2]

On dissolution of a partnership one-fifth of a debt due to the partnership from the defendant fell to the share of one of the partners K. The latter sued the defendant for recovery of his share of the debt, impleading also as defendants his former partners who refused to join as plaintiffs, and obtained a decree. Subsequently the other partners sued the defendant for recovery of the remaining four-fifths of the debt.

Held: that the suit was not barred under the provisions of S. 45. [P 15 C 2]

*Badri Nath Kapur*—for Appellant.*Ram Chand Manchanda*—for Respondent.

**Judgment.** — The defendant Walia owed money to the firm of Bhag Mal-Saddu Ram. The partnership was dissolved and in the partition 1/5th of the debt due from Walia fell to the share of one of the partners, Khan Chand. The latter sued Walia for 1/5th of the debt, impleading also as defendants his former partners, who refused to join as plaintiffs. Walia pleaded that a suit by one of the partners for 1/5th of the debt was not maintainable, but the Court decided against him and gave Khan Chand a decree. The present suit has been brought by Khan Chand's former partners for the remaining 4/5ths of the debt. The Munsif passed a decree in their favour, but the District Judge on appeal has dismissed the suit, holding that under S 45, Contract Act, the right to claim performance of the contract rests with



all the persons who were members of the firm jointly, and that a partner cannot after dissolution sue to recover a part of the debt as individually due to him. The plaintiffs have appealed to this Court. In the memorandum of appeal the ground taken is that the District Judge has erred in holding that S. 45, Contract Act, bars the suit, because the respondent waived his right to raise the objection by not raising it in the former suit. The reason given is wrong as the respondent did as a matter of fact object in the former suit that the claim for a portion of the debt was not maintainable. The appeal should not however fail if the learned District Judge's view is in fact erroneous, even though the appellants have given a wrong reason for contending that it is erroneous.

The respondent's case is that as there was only one debt due to the firm the members of the firm cannot, after the firm has been dissolved, split up the cause of action and bring separate suits for their shares of the debt. The answer to this contention is that the appellants are not seeking to split up the cause of action, but that it has already been split up by the decree given in Khan Chand's suit, for which they are not responsible. The Court having decided in that case rightly, or wrongly, that Khan Chand was entitled to a decree for  $\frac{1}{5}$ th of the debt the appellants had no option but to sue for  $\frac{4}{5}$ ths or lose their money altogether. It would clearly be inequitable that their claim should be dismissed not for any fault of theirs but on account of the action taken by Khan Chand. It is true that they might have availed themselves of the opportunity of joining Khan Chand as plaintiff in the former suit but if the respondent's contention were correct the present suit would not have been maintainable even if the appellants had not been impleaded as defendants in the former case. One of several joint creditors might collude with the debtor and obtain a decree against him for a small portion of the debt on his admission with the result, if the argument now advanced were sound that the other creditors would be absolutely debarred from recovering the balance. S. 45, Contract Act, does not enable a debtor to evade his liability in this manner. It pro-

vides that when a person has made a promise to two or more persons jointly then, unless a contrary intention appears from the contract, the right to claim performance rests as between him and them with them during their joint lives. Assuming that this section makes it necessary that where a debt is due to several persons jointly all should join in a suit brought for its recovery, it is nevertheless not a legitimate inference that when one of the original creditors has been paid his share and to be a creditor the remaining creditors cannot maintain a suit thus ceased for the balance of the debt. The words "as between him and them" are not without significance. As between the debtor and the original body of creditors the right to claim payment would rest with that body, but if by part payment the number of creditors is reduced the right to claim payment will be a right arising as between the debtor and the remaining creditors. The decree obtained by Khan Chand puts the parties in the same position in which they would have been if the defendant had entered into a fresh contract paying  $\frac{1}{5}$ th of the debt to Khan Chand and agreeing that the plaintiffs should become his creditors for the remainder.

The suit is therefore maintainable and I accordingly accept the appeal, set aside the decree of the lower appellate Court and remand the case to that Court under O. 41, R. 23, Civil P. C., for disposal on the merits. Stamp on the appeal in this Court to be refunded. Other costs to be costs in the case.

R.M./R.K.

*Appeal accepted.*

### A. I. R. 1919 Lahore 15

ABDUL RAOOF AND MARTINEAU, JJ.

*Mt. Raj Karni*—Decree-holder—Appellant.

v.

*Karam Elahi*—Judgment-debtor—Respondent.

Misc. Second Appeal No. 230 of 1919, Decided on 6th June 1919, from order of Dist. Judge, Jhelum, D/- 8th October 1917.

(a) Civil P. C. (1908), Ss. 47, 104 (b) and O. 21, R. 40—Application for judgment-debtor's arrest dismissed—Order is appealable—Order directing arrest or detention of judgment-debtor is order under S. 47.

An order under O. 21, R. 40, dismissing the application of a decree-holder for the arrest and



imprisonment of the judgment-debtor relates to the execution of a decree and as such comes under S. 47 of the Code and is appealable.

[P 16 C 2]

The concluding words of S. 104, Cl. (b), indicate that where an order directing the arrest or detention of the judgment-debtor is made in execution of a decree, it is to be treated as an order coming under S. 47.

[P 16 C 2]

*Tek Chand*—for Appellant.

**Judgment.**—The facts out of which this miscellaneous appeal has arisen are simple and the point for decision is a short one. One Thandi Shah held two money decrees against Karam Ilahi. Execution proceedings were taken as to one of the decrees. A house was sold upon which the parties entered into a compromise. One of the terms of the compromise was that the amount of the decree would be payable by instalments and in case of default of any instalment the decree-holder would have the power to recover the whole amount by executing the decree against the person and property of the judgment-debtor. A default having taken place, the decree-holder applied for the arrest and imprisonment of Karam Ilahi. Therefore the judgment-debtor was called upon to show cause why he should not be arrested and imprisoned. Several objections were urged by him, which are given in detail in the judgment of the executing Court. That Court accepted the objections and dismissed the application of the decree-holder for the arrest and imprisonment of the judgment-debtor. This order was made under R. 40, O. 21, Civil P. C. The decree-holder preferred an appeal to the District Judge of Jhelum. This appeal was dismissed by the learned District Judge on the ground that an order made under the abovementioned rule was not appealable. He was of opinion that the order was neither appealable as an order under O. 43, nor as a decree under S. 47, Civil P. C. The decree-holder has come up in appeal to this Court, and it is argued on his behalf that the order appealed against related to the execution of a decree, and as such came under S. 47 of the Code.

Reliance is placed on the provisions of Cl. (b), S. 104, in support of this contention. Under the said clause an appeal is allowed from

“an order under any of the provisions of this Code imposing a fine or directing the arrest or detention in civil prison of any person except

where such arrest or detention is in execution of a decree.”

It is contended that the concluding words of the clause indicate that where an order directing the arrest or detention is made in execution of a decree, it is to be treated as an order coming under S. 47. In our opinion there is force in this contention which is supported by authorities. In a decision of the Punjab Chief Court reported as *Bishna v. Banta* (1) it was decided that an order made under S. 337 (a) was appealable as a decree as it came within the purview of S. 244 (c) of the old Code. A similar view was taken by the Madras High Court in a case reported as *Abdul Rahiman v. Mahomed Kassim* (2). The cases reported as *Nayana Naickan v. Ghulam Ghouse* (3) and *Subbarama Ayyar v. Arunachellam Chettiar* (4) also go to support the contention. In the face of these authorities the decision of the lower appellate Court cannot be supported. We therefore set aside the judgment and decree of the lower appellate Court on this preliminary point and remand the case to that Court under O. 41, R. 23, to be re-admitted under its original number in the register of pending appeals and to be disposed of according to law. Costs will abide the result.

R. M./R. K.

*Case remanded.*

(1) [1905] 69 P. R. 1905.

(2) [1898] 21 Mad. 29.

(3) [1910] 5 I. C. 909.

(4) [1916] 32 I. C. 731.

## A. I. R. 1919 Lahore 16

ABDUL RAOOF, J.

*Nusrat Ali*—Appellant.

v.

*Sakina Begam and others*—Respondents.

Misc. Second Appeal No. 2981 of 1918,  
Decided on 19th February 1919.

**Civil P. C. (1908), S. 47—Execution sale—Obstruction by judgment-debtor or his legal representative to delivery of possession—Dispute does not relate to execution, discharge or satisfaction of decree.**

Where, after an auction sale is confirmed and a sale certificate is granted to the auction-purchaser, the judgment-debtor or his legal representative objects to the delivery of possession of the property sold, the dispute cannot be said to relate to the execution, discharge or satisfaction of the decree within the meaning of S. 47 inasmuch as the decree has already been satisfied, and therefore the executing Court cannot entertain the objection.

[P 18 C 1]

*Santanam*—for Appellant.

*Obedulla*—for Respondents.



**Judgment.**—This is a second appeal against an appellate judgment passed by the lower Appellate Court. The facts out of which this appeal has arisen are fully stated in the judgment of the first Court, and I shall refer only to some of them which are material for the decision of this appeal. On 17th February 1916, an ex parte decree on a mortgage was passed in favour of one Gauri Parshad. On 13th July a final decree for sale was passed in favour of the decree-holder. On 10th October 1916, the house in dispute was sold in execution of the said decree and was purchased by the present appellant Nusrat Ali. The present respondent, Mt. Sakina Begam, the wife of the judgment-debtor Rahim Bakhsh, put in an application objecting to the proceedings on the ground that her husband had gone out of the country and was on the front in France.

It does not appear in what capacity she made that application; she had no locus standi in her capacity as the wife of the judgment-debtor to raise any question with respect to the execution of the decree. Her application was rejected and on 14th November 1916, the sale was duly confirmed, and on 12th December 1916 a sale certificate was granted to the auction purchaser. After that Mt. Sakina Begam filed a declaratory suit to get the ex parte decree set aside, but that suit was dismissed for want of production of evidence. On 18th November 1916, Nusrat Ali, the auction-purchaser, applied to the Court to be put in possession of the house. The decision of that application was delayed pending the decision of the suit to which I have referred above. On 20th November 1917 the auction-purchaser put in another application asking the Court to put him in possession of the property. Certain proceedings were taken on that application, which need not be specifically referred to. There was obstruction on the part of Mt. Sakina Begam to the delivery of possession. Thereupon, on 17th December 1917, the auction-purchaser put in an application in Court complaining of the obstruction on the part of Mt. Sakina Begam. At this stage the Court ordered notice to be issued to Mt. Sakina Begam as the legal representative of the judgment-debtor Rahim Bakhsh, as in the meantime it had been discovered that he had died. Mt. Sakina Begam

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then came in and put in an application on 8th January opposing the application of the auction-purchaser for possession. The Court of first instance upon this state of things was of opinion that the objections raised by Mt. Sakina Begam could not be entertained and the only remedy open to her was to file a regular suit. Taking this view the Court ordered that delivery of possession of the house should be made to the auction purchaser and that the objections of Mt. Sakina Begam be dismissed.

The objector appealed to the lower appellate Court. The Court has held that as the lady was brought on the record as the legal representative of her husband who was the judgment-debtor under the decree, she was entitled to raise the question which she did under S. 47, Civil P. C. Being of this opinion the lower appellate Court decided on the merits in favour of the lady and set aside all the proceedings in execution and dismissed the application of the auction-purchaser for the possession of the property. The auction-purchaser has preferred the present second appeal to this Court against the decree and order of the lower appellate Court, and the question which has been argued on his behalf before me is that S. 47, Civil P. C., has no application to this case. The sale had been confirmed and thereupon a sale certificate had been granted. The question raised therefore on the objection by the lady was not one relating to execution, discharge or satisfaction of the decree, inasmuch as the satisfaction of the decree had taken place already. The learned counsel who has appeared in support of the appeal has relied upon a very recent decision of this Court which is reported as *Chotha Ram v. Mt. Karmon Bai* (1), and in my opinion the contention is fully borne out by the decision in that case. In fact, the present case is much stronger than the case reported as *Chotha Ram v. Mt. Karmon Bai* (1). In that case the auction-purchaser was the decree holder himself, and in spite of that, it was held that the matter did not relate to the execution or satisfaction of the decree. The learned Judges in that case observed:

"If therefore after the Court executing the decree has entered up satisfaction of the decree in whole or in part, a dispute arises between the

(1) [1918] 8 P. R. 1918=14 I. C. 169.



quondam decree-holder, in his new capacity of auction-purchaser, and the quondam judgment-debtor, or their representatives, regarding the possession of the property sold at the public auction held in execution of the decree, the dispute cannot properly be said to relate to 'execution, discharge or satisfaction of the decree,' which under S. 47, Civil P. C., can only be determined by the executing Court."

In this case an outsider is the auction-purchaser. These remarks apply with greater force to the case of a stranger auction-purchaser. A similar view was taken by a Full Bench of the Allahabad High Court in a case reported as *Bhagwati v. Banwari Lal* (2). That was also a case in which the decree-holder himself was the auction-purchaser. In my opinion both these cases fully support the argument put forward before me by the learned counsel who has argued the appeal. The lower appellate Court entirely failed to understand the scope of S. 47, Civil P. C., and merely based its judgment on the finding that the lady having been brought on the record as the legal representative of the deceased judgment-debtor, she was entitled to raise the question. It entirely failed to consider whether the question raised was one which related to the execution, satisfaction or discharge of the decree. In this view the appeal should be allowed, the decree of the lower appellate Court should be set aside and that of the Court of first instance restored with costs in all Courts, and I order accordingly.

R.M./R.K. *Appeal allowed.*

(2) [1909] 31 All. 82=1 I. C. 416 (F.B.).

### A. I. R. 1919 Lahore 18

RATTIGAN, C. J. AND MARTINEAU, J.  
*Anand Bahadur*—Plaintiff—Appellant.

v.

*Hardil Aziz*—Defendant—Respondent.

Second Appeal No. 1516 of 1915, Decided on 30th January 1919.

(a) Civil P. C. (1908), O. 22, Rr. 3, 4 and 11—**Appeal—Death of parties—Action purely personal—Right to continue appeal does not survive.**

Where both parties to suit die during the pendency of an appeal by one of them, and the action is a purely personal one, as for instance, a declaration that the defendant is not the lawful wife of the plaintiff, the right to continue the appeal does not survive to the representatives of the deceased parties. [P 18 C 2]

(b) Civil P. C. (1908), S. 11—**Court deciding previous suit must be competent to decide subsequent suit—Judgment in previous suit must be binding on parties.**

In order to apply the rule of res judicata, the Court which decided the former suit must be com-

petent to decide the subsequent suit, and the judgment in the previous suit must be binding on the parties. Where the Court which tried the previous suit was, by reason of the pecuniary limits of its jurisdiction, incompetent to try the subsequent suit, and the judgment in the former suit was binding on the defendant only in a representative capacity, there would be no question of res judicata. [P 18 C 2]

*Fazal Din and Hukam Chund*—for Appellant.

*Mehr Chand*—for Respondent.

**Judgment.**—The defendant Prem Kaur having obtained a maintenance order from a Magistrate against the plaintiff Tegh Bahadur, the latter sued for a declaration that the defendant was not his lawful wife. The Courts below gave judgment against him, and he then filed the present appeal in this Court. During the pendency of the appeal both parties died. The plaintiff's son Anand Bahadur has been impleaded as appellant in place of his father, and the defendant's son Hardil Aziz as respondent, as representative of his mother. It is however contended for the respondent that having regard to the nature of the case, as the original parties are dead, there is nothing to be gained by proceeding with the appeal, which should be dismissed; and reliance is placed on *Mt. Sat Bharai v. Mt. Sat Bharai* (1). The case cited is not exactly in point as the claim was one of a different nature from the claim in the present case, but we agree that in the circumstances it would be useless to go on with the appeal. In fact it appears to us that the plaintiff and the defendant having both died, the right to appeal does not survive, as the action was a purely personal one.

Counsel for the appellant informs us that a suit by Hardil Aziz to establish his right to the "gaddi" of which the deceased Tegh Bahadur was mahant, on the ground of his being the deceased's son, is pending in the Court of the Subordinate Judge, and that the proceedings have been stayed on account of this appeal. But it is clear that our decision could not operate as res judicata in that case. In the first place, the Munsif who tried the suit in the present case would not have been competent to try the suit now pending before the Subordinate Judge, which is said to be of the value of Rs. 15,000 or more. In the second place our judgment would not be binding on

(1) [1913] 65 P. R. 1913=18 I. C. 329.





a minor and should consequently be represented by a guardian ad litem. We must therefore hold that the plaintiff rightly described himself as a major in the sale deed and that he cannot now back out of it. For the aforesaid reasons we confirm the decree of the lower appellate Court and dismiss the appeal with costs.

R.M./R.K.

*Appeal dismissed.***A. I. R. 1919 Lahore 20**

PETMAN, J.

*Khandu Lal*—Defendant—Appellant.  
v.*Fazal*—Plaintiff—Respondent.Misc. Second Appeal No. 2800 of 1918,  
Decided on 4th June 1919.(a) **Mortgage—Lekha mukhi mortgage explained.**

A lekha mukhi mortgage is a usufructuary mortgage by which the land is made over to the mortgagee who has to look to its produce for the payment of the mortgage debt, the mortgagor undertaking no personal liability and the mortgagee not being entitled to sue for the debt.

[P 20 C 2, P 21 C 1]

(b) **Mortgage — Lekha mukhi mortgage—Suit for redemption—Limitation is as in usufructuary mortgage.**

The starting point for limitation in respect of a suit for redemption of a lekha mukhi mortgage is the same as in the case of ordinary usufructuary mortgages.

[P 21 C 1]

(c) **Limitation Act (1908), Art. 148 — Lekha mukhi mortgage—Suit for redemption is governed by Art. 148.**

A suit for redemption of lekha mukhi mortgage is governed by Art. 148, and therefore the period of limitation is 60 years from the date of the mortgage.

[P 21 C 1]

(d) **Civil P. C. (1908), O 7, R. 6—Suit as laid in plaint prima facie barred—R. 6 applies.**

Order 7, R. 6, applies to cases in which the suit as laid in the plaint is prima facie barred by limitation.

[P 21 C 2]

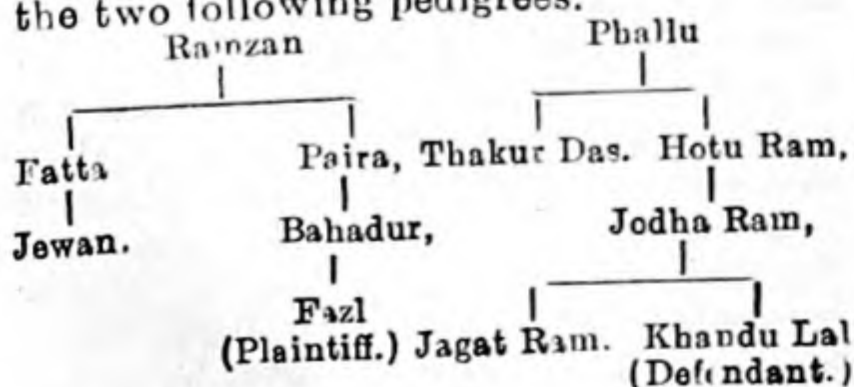
(e) **Mortgage—Suit for redemption—Limitation.**

In a suit for redemption the burden of proving that the suit is within limitation lies on the plaintiff.

[P 22 C 1]

*Moti Sagar*—for Appellant.*M. L. Puri*—for Respondent.

**Judgment.**—For a proper understanding of this case it is necessary to set out the two following pedigrees:



In 1915 Fazl instituted a suit for the redemption of land on the allegation that Jewan had mortgaged it by a form of mortgage known as lekha mukhi in 1884, that he was Jewan's heir and that the mortgage-money had been fully realized by the mortgagee from the produce. He also claimed Rs. 100 on the allegation that produce to that value had been realized in excess and relied on the taking of produce periodically as saving limitation. The defendant pleaded inter alia that the suit was barred by limitation because the mortgage which it was admitted was a lekha mukhi one, had been made in 1848. The first Court held that the suit was barred by limitation and none of the grounds alleged from time to time during the course of the trial saved limitation. The lower appellate Court held that the mortgage had been made more than 60 years before the date of suit, but that the starting point of limitation in lekha mukhi mortgage was not the same as in the case of an ordinary usufructuary mortgage and that in the case of the former the right of redemption cannot be said to accrue until the value of the produce of the land mortgaged amounts, after deducting legitimate expenditure, to the mortgage-debt and interest. It also held that limitation was saved by virtue of an acknowledgment in a will.

For the appellant it is contended that the lower appellate Court has misunderstood what a lekha mukhi mortgage is. This appears to be the case. The respondent supports the view taken by the Court by reference to Ghose's Law of Mortgage, Vol. 1, Edn. 4, p. 103, where reliance is placed on Tupper's Customary Law, Vol. 3, p. 219. But this last authority has been misread. It refers to *Ranja v. Mt. Piaree* (1) and proceeds to give an extract from an assessment report of Mr. Steedman, in which reference is made to the owner's share of produce being handed over to the mortgagee, but that refers to the handing over by a tenant and not that possession is retained by the mortgagor. In *Gahi Mal v. Shera* (2) a lekha mukhi mortgage has been explained as being a usufructuary one by which the land is made over to the mortgagee, who has to look to its produce for the payment of the mortgage-debt, the mortgagor undertaking no personal liability.

(1) [1869] 99 P. R. 1869.

(2) [1881] 90 P. R. 1881.



and the mortgagee not being entitled to sue for the debt. The matter is also dealt with in Rattigan's Customary Law, Edn. 8, p. 151. Counsel for the respondent supports the construction by the lower appellate Court of a lekha mukhi mortgage and contends that the starting point for limitation in such a mortgage is the date when the debt is fully realized from the produce. But in that case, I think the mortgage would have become automatically redeemed. There appears to be no reason to take a different starting point for limitation that in the case of ordinary usufructuary mortgages. No date was specified for redemption and consequently the mortgage became liable to be redeemed immediately after it was made. This principle of law is so well established that it cannot be contested. In the present case Art 148, Lim. Act, would apply and therefore the period for limitation is 60 years from the date of the mortgage.

Further points contended on behalf of the appellant are that the alleged acknowledgment in the will relied on by the lower appellate Court as saving limitation is not an acknowledgment within the meaning of S. 19, Lim. Act, and that the plaintiff was not entitled to rely on the will because he had not done so in the plaint; that in the plaint the plaintiff had relied only on the realization of produce.

It is pointed out that even after the statement of defence the plaintiff had not relied on the will in his replication and that the first time the will was referred to was in the course of arguments after the case was closed, that then the first Court adjourned the case and sent for a record in which a copy of the will was stated to be attached, and this copy not being to the plaintiff's satisfaction because it was obviously dead against him, another record of a case was sent for which also contained a copy and then an opportunity was given to the plaintiff to prove what the original will was in opposition to the copies on those records by a witness shown to be wholly hostile to the defendant. In my opinion the action of the first Court was not proper. The plaintiff should not have been permitted except under exceptional circumstances, which are not shown to exist, to re-open the case at the stage at which the case had reached on a point which

had never been pleaded and as to which there was no evidence on the record. In support of his contention that the plaintiff, not having relied on the will in the plaint is barred from doing so the appellant relies on O 7, R. 6, Civil P. C. and on *Gobinda Mal v. Santa* (3) and *Jogeshwar Roy v. Raj Narain Mitter* (4), but in my opinion the rule relied on relates to a case in which the suit as laid in the plaint is prima facie barred by limitation and in the present case the suit for redemption was based on a mortgage alleged to be of 1884 and prima facie not timebarred. The fact that a ground for saving limitation was set out in the plaint is immaterial. The decisions relied on by the appellant do not help him and on the contrary, the judgment in the Punjab case (3) appears to be against him.

Counsel for the respondent does not attempt to rely on the ground stated in the plaint for saving limitation, namely, the taking of produce and has ultimately confined himself solely to the will. But I am of opinion that the finding of the lower appellate Court in respect of the will cannot be upheld. It has ignored most important evidence, as the following facts will show. About the year 1826 Ramzan transferred half his land to Phallu in consideration of the latter paying the expenses of sinking a well. In 1848, the well having fallen in the remaining half then belonging to Fatta and Paira, the sons of Ramzan, was mortgaged to Thakur Das and Jodha Ram, descendants of Phallu, to raise money to sink a new well. The result was that the  $\frac{1}{4}$ th share of Fatta and  $\frac{1}{4}$ th share of Paira were mortgaged to Thakur Das and similar shares were mortgaged to Jodha Ram. In 1888 Jewan the son of Fatta redeemed his  $\frac{1}{4}$ th share mortgaged to Thakur Das and the mutation was effected in 1887. In 1891 the  $\frac{1}{4}$ th share of Paira mortgaged to Thakur Das and the other  $\frac{1}{4}$ th share of his mortgaged to Jodha Ram were sold to Jodha Ram. Thus by 1892 Jodha Ram had become owner of  $\frac{1}{4}$ th of the property by purchase and he had a  $\frac{1}{4}$ th share by inheritance from Phallu who had purchased half in 1826. Consequently, only  $\frac{1}{4}$ th belonging to Fatta remained to be

(3) A. I. R. 1914 Lah. 337=26 I. C. 441=83 P. R. 1914.

(4) [1904] 81 Cal. 195.



redeemed and for this the present suit was instituted.

The will of Jodha Ram is of 1892 and he therefore rightly mentions two  $\frac{1}{4}$ th shares, one *milkiyat kadim* (inherited) and the other  $\frac{1}{4}$ th *baigarifta* (purchased). The lower appellate Court has misread the words 'do ruba,' meaning two quarters, as 'domarabba' which have quite another meaning. This misreading has, I think completely misled the lower appellate Court. It is not alleged or suggested that the words 'do ruba' have been tampered with. The correctness of the copies in respect of the matter discussed is obvious from the facts set out above. The suggestion that the word in the original will was *marhoona* is, I think untenable. There was in 1892 no mortgage relating to  $\frac{1}{4}$ th of the property and the present claim as explained, relates to  $\frac{1}{2}$ th. There are no doubt some alterations in the second copy but there is little doubt that if they are not genuine alterations made by the copyist they are the result of attempts on the part of the plaintiff and not the defendant to raise doubts in his own interests. The theory of a forgery of the second copy must assume that the clear copy filed in a Court earlier than the other was also a forgery, but it bears the Court's endorsement of 1912 and it is incredible that a similar one would not have been filed in the subsequent suit. The Court has failed to consider the words immediately below those alleged to be forged, which explain what each quarter refers to and again in the body of the will words have been ignored which refer to a  $\frac{1}{4}$ th purchased and not mortgaged. The sale deed of 1891 is on the record and was not referred to.

The lower appellate Court at the end of its judgment holds:

"My conclusion as regards the evidence of the will is that I am not satisfied that the copies produced by the defendant are accurate. I find that the defendant has not shown that the suit is barred by limitation,"

but it was the plaintiff who produced the copies and the Court is clearly wrong as to the burden of proof, which was on the plaintiff, who had to prove that his suit was within limitation, and this rightly appears to have been the opinion of the Court earlier in its judgment when it excused the placing of the burden of proof on the defendant by the first Court in view of the plaintiff having relied in

his plaint on the revenue entries of 1884, but which entries both Courts held to be incorrect. For the above reasons I hold that the will contains no acknowledgment whereby limitation is saved.

The plaintiff-respondent tried in this Court to go behind the finding of fact that the mortgage was made more than 60 years before suit, and relied on a ruling of the Punjab Chief Court, *Juma v. Mubarak Khan* (5), for the proposition that, inasmuch as in the first Regular Settlement of 1859 the mortgage is mentioned whilst in the Summary Settlement of 1855 it is not referred to, a presumption must follow that the mortgage was made between those dates, unless there is conclusive evidence to the contrary; and the only evidence relied on in the present case is the History of Wells compiled in 1879, which, it is argued, is not conclusive, because it is not a statement of parties, may be based on hearsay, is not supported by any entries in revenue papers, was not a necessary document to be prepared and does not carry any presumption, and it is further contended that there is no evidence, because the entry only amounts to a statement that a mortgage existed in 1879. But these allegations are erroneous. The History of Wells is maintained under rules framed under powers conferred by the Land Revenue Act, the entry purports to be a statement of Fatta and Paira themselves and shows that the mortgage was made to meet the cost of the construction of the new well which was sunk in 1848, and, finally, the entry in the regular settlement of 1859 also shows that the mortgage was for the purpose of constructing the well. Anything more conclusive it would be difficult to find. I hold that no second appeal lies from the finding that the mortgage was made more than 60 years before suit and that in any case it is amply so proved.

For the above reasons I hold that the suit is time barred. I accept the appeal, set aside the decree of the lower appellate Court and restore that of the first Court with costs in favour of the appellant throughout.

R.M./R.K.

*Appeal accepted.*

(5) [1912] 97 P. R. 1912=15 I. C. 62.



**A. I. R. 1919 Lahore 23**

SCOTT-SMITH, J.

*Nazim Khan*—Defendant—Petitioner.

v.

*Alam Khan* — Plaintiff — Opposite Party.

Civil Revn. No 218 of 1917, Decided on 21st January 1919, from order of Dist. Judge, Mianwali, D/- 3rd February 1917.

**Limitation Act (1908), S. 14—Plaintiff in subsequent suit, defendant in previous suit, cannot claim extension.**

An extension of time, under S. 14, can only be claimed if the plaintiff in the subsequent suit was the plaintiff in the previous suit; if he was the defendant, it cannot be said that he had prosecuted with due diligence another civil proceeding within the meaning of the section

(P 23 C 2)

*Badri Nath Kapur*—for Petitioner.*Raghunath Rai*—for Opposite Party.

**Judgment.**—On 11th August 1915, *Nazim Khan*, defendant petitioner, brought a complaint against *Alam Khan*, plaintiff-respondent, and another, under S. 406, I. P. C. This complaint was dismissed and complainant was referred to a civil suit on 28th September 1915. Prior to that, on 22nd September, the parties had referred their dispute to arbitration and on 23rd September an award was given in favour of *Alam Khan*. On 3rd January 1916 *Nazim Khan* brought a suit against *Alam Khan* for Rs 817 on the basis of a receipt which he held, altogether ignoring the award. *Alam Khan* objected, putting forward as a bar to the suit. On 6th April 1916 the Court disallowed the defendant's objections and said that if he wished to get the award carried into effect, he should make an application to have it made a rule of Court. Upon this *Alam Khan* instituted the present proceedings, applying that the award should be filed in Court. The first Court rejected the application, holding that it was barred by time and also on the ground that the award was invalid, as it had the effect of compounding a noncompoundable criminal offence. The lower appellate Court accepted the appeal and gave the plaintiff a declaratory decree to the effect that the award was a good one and should be acted upon. Defendant has filed an application for revision to this Court, and it is contended on his behalf that the application for filing the award was barred by time, having been made after the expiration of the statutory period of six

months. The lower appellate Court held that though the application had been filed in Court after the statutory period, yet the plaintiff was entitled to the benefit of S. 14, Lim. Act. In *Kala v. Mehru Mal* (1) it was held that a person claiming under S. 14, Lim. Act, an exclusion of time during which a former proceeding was pending, must prove two things: first, that he had prosecuted the former proceeding with due diligence; and secondly, that the former Court had been unable to entertain it from defect of jurisdiction or other cause of a like nature.

Now it cannot be said that the plaintiff in the present case had prosecuted with due diligence another civil proceeding within the meaning of S. 14, Lim. Act. The previous case was brought by the present defendant, and the present plaintiff as the defendant in that case merely defended the suit. It was held in *Rajah Barodakant Roy v. Sookamoy Mookerjee Dabee* (2) that the previous suit ought to have been brought by the plaintiff in the second suit or some person through whom he claims. Moreover, it cannot be said that the Court in which the previous suit was instituted was unable for defective jurisdiction or other cause of the like nature to entertain it. The Court was certainly able to entertain that suit. All that was held was that the defendant could not put forward a particular defence and that he should establish that defence by bringing a separate suit. Counsel for the petitioner also cites *Ooday Monee Dabee v. Bishonath Dutt* (3) and *Ram Ugrah v. Achraj Nath* (4), which support his contention. *Maharajah Jugutendur v. Din Dyal Chatterjee* (5) is distinguishable, because in that case the defendant in the suit claimed a set-off on a full court-fee. *Lakhan Chunder v. Madhusudan* (6), which is cited by respondent's pleader, is also obviously distinguishable. I hold that S. 14, Lim. Act, in terms does not apply to the present case and that the plaintiff is not entitled to any deduction of time thereunder. His application is clearly barred by time.

(1) [1916] 41 P. R. 1916=32 I. C. 497.

(2) [1864] 1 W. R. 29.

(3) [1868] 9 W. R. 455.

(4) A. I. R. 1915 All. 369=31 I. C. 899=38 All. 85.

(5) [1864] 1 W. R. 310.

(6) [1908] 85 Cal. 209.



I therefore allow the revision and setting aside the order of the lower appellate Court restore that of the first Court; but as the proceedings were instituted in accordance with the lower Court's mistaken view of the law, I leave the parties to bear their own costs throughout.

R.M./R.K. *Petition allowed.*

### A. I. R. 1919 Lahore 24

SHADI LAL AND LEROSIGNOL, JJ.

*Umar Bakhsh and others*—Plaintiffs—Appellants.

v.

*Sohne Khan and another*—Defendants—Respondents.

Second Appeal No. 162 of 1915, Decided on 27th February 1919, from decree of Dist. Judge, Hoshiarpur, D/- 26th October 1914.

**Custom—Adoption—Ghorewaha Rajputs—Daughter's son can be adopted—Riwajiam, entry in, held not correct statement.**

A Ghorewaha Rajput of the Garhshankar Tahsil in the Hoshiarpur District is authorized by custom to adopt his daughter's son.

The entry in the riwajiam of the Hoshiarpur District prepared at the last settlement stating that there is no custom of adoption among the Rajputs of the Garhshankar Tahsil is not a correct statement of the custom on the subject.

[P 24 C 2]

*Shuja-ud-Din*—for Appellants.

*Fakir Chand*—for Respondents.

**Judgment.**—Sohne Khan, a Ghorewaha Rajput of the Garhshankar Tahsil in the Hoshiarpur District adopted his daughter's son Ghulam Rasul, who is himself a Ghorewaha Rajput. The learned District Judge, concurring with the Subordinate Judge, has decided in favour of the factum and the validity of the adoption; and the sole question, which arises upon the certificate granted by him, is whether a Ghorewaha Rajput is authorized by custom to adopt his daughter's son. The appellants, who are the first cousins of Sohne Khan, place their sole reliance upon an entry in the riwajiam prepared at the last settlement, when the Rajputs of Tahsil Garhshankar stated that among them there was no custom authorizing adoption. The settlement officer, who compiled the riwaj-i-am however expressed his opinion that the denial by the Rajputs of the Garhshankar Tahsil, as to the custom of adoption was not borne out by the exceptions quoted, and we find that there were, at any rate, two instances of the adoption of daughter's sons

among the Mahomedan Rajputs of Mauza Kathgarh of Tahsil Garhshankar: vide Humphrey's Customary Law of the Hoshiarpur District, pp. 147 and 186. It is to be observed that a Division Bench of this Court in Civil Appeal No. 1229 of 1910 [*Rahmat Khan v. Bisan* (1)], while dealing with an entry in the riwajiam of Garhshankar Tahsil excluding daughter and daughter's son from inheritance to ancestral estate in the presence of collaterals more distantly related than the seventh degree, expressed an opinion that the riwajiam was not entitled to any weight.

So far as the question of the existence of the custom of adoption among the Ghorewaha Rajputs is concerned, we have a direct authority to the effect that such a custom does exist. In *Ajhey Khan v. Bhambu Khan* (2) this Court after an exhaustive inquiry came to the conclusion that a Ghorewaha Rajput of Garhshankar tahsil was authorized by custom to make a gift of his ancestral estate to his sister's grandson whom he had brought up as a son. The judgment refers to instances of adoption among the members of the tribe, and the same remark applies to the judgment in *Moula Bakhsh v. Hame Khan* (3), which relates to the custom of adoption among the Ghorewaha Rajputs of the Jullundur District. These two judgments have never been dissented from; in deed they have been cited with approval in *Karim Bakhsh v. Fatta* (4) and *Sultan Bakhsh v. Mt Mohian* (5).

The learned counsel for the appellants is unable to cite a single instance, judicial or otherwise, in support of the contention that the custom of adoption does not exist among the Ghorewaha Rajputs. In view of the previous rulings of this Court and the instances referred to above, we are unable to accept the entry in the riwajiam as a correct statement of the custom on the subject. We accordingly endorse the decision of the Courts below and dismiss the appeal with costs.

R.M./R.K.

*Appeal dismissed.*

(1) [1913] 19 I. C. 850.

(2) [1883] 174 P. R. 1883.

(3) [1883] 173 P. R. 1883.

(4) [1891] 113 P. R. 1891.

(5) [1894] 64 P. R. 1894.



**A. I. R. 1919 Lahore 25 (1)**

MARTINEAU, J.

*Arur Singh*—Defendant—Appellant.

v.

*Partab Singh and others*—Plaintiffs—Respondents.

Second Appeal No. 2143 of 1918, Decided on 19th March 1919, from decree of Dist. Judge, Lahore, D/- 6th May 1918.

Limitation Act (9 of 1908), S. 19—Acknowledgment need not be express—Bond making mention of separate bond is acknowledgment.

An acknowledgment of liability under S. 19 need not be express, but may be implied. A bond executed by the defendant made mention of there being a separate bond for a certain sum executed by him in favour of the plaintiff:

*Held*: that this statement implied that money was due to the plaintiff separately on the other bond and that therefore it amounted to an acknowledgment of liability within the meaning of S. 419. [P 25 C 1]

*Golind Ram*—for Appellant.*Tiroth Ram*—for Respondents.

**Judgment.** — The plaintiffs sue for money due on two bonds, dated 2nd November 1908 and 23rd July 1914, and have been given a decree. The questions are only whether the suit on the first bond is within time by reason of an acknowledgment contained in the second one and whether consideration passed for the first bond.

The bond of 1914 makes mention of there being a separate bond for Rupees 430 15-0 (i.e., the bond of 2nd November 1908). This clearly implies that money was due to the plaintiff separately on the other bond. The learned District Judge holds that an acknowledgment of liability need not be express, but may be implied, and this view is supported by the statement of the law given on p. 104 of Rustomji's Law of Limitation, Edn. 2, by *Gopalrao v. Harilal* (1) and by *Maniram Seth v. Seth Rupchand* (2), in which it was held by the Privy Council (on p. 105) that an acknowledgment of liability by one of the parties to pay his debt to a certain person might be deduced from his written admission of having had open and current accounts with that person. I agree therefore with the lower appellate Court that the suit is within time. As regards consideration it is argued for the appellants that the statement made by Sant Singh, the original plaintiff, on which reliance has been placed by the lower appellate

Court, cannot be treated as evidence as the decedent died before he could be cross-examined, and that the diary referred to in this statement must also be left out of account. Assuming that this is so, still it appears from the judgment of the learned District Judge that he regarded the remaining evidence alone as sufficient proof of the passing of consideration. He said that the admission of the debt contained in the bond of 1914 was good evidence that consideration had passed, and that the evidence of Dial Singh and other persons, coinciding with the admission, could not be swept aside. The exclusion of Sant Singh's statement and of his diary would not, therefore be a sufficient reason for interfering with the lower appellate Court's decision. I accordingly dismiss the appeal with costs.

R.M./R.K.

*Appeal dismissed.***A. I. R. 1919 Lahore 25 (2)**

RATTIGAN, C. J. AND MARTINEAU, J.

*Mt. Husain Bibi*—Appellant.

v.

*Hakim and others*—Respondents.

Second Appeal No. 1963 of 1915, Decided on 30th January 1919, from decree of Dist. Judge, Gujranwala, D/- 10th June 1915.

Limitation Act (1908), Ss. 6, 7 and 14—Pre-emption suit—Ss. 6 and 7 do not apply—One of several vendees dying before institution of suit—Legal representative brought on record after limitation—Ss. 5 and 14 held not applicable.

On 7th October 1914 the plaintiff brought the present suit to pre-empt certain lands sold by her father on 7th November 1913. One of the vendees had died before the suit was instituted and his heirs were impleaded as co defendants on 8th December 1914. The suit was dismissed as time barred on the ground that the sale was one jointly in favour of the vendees; and as the suit was barred against the representatives of the deceased vendee, it was equally barred against the surviving vendee. Plaintiff appealed, pleading minority and ignorance of the vendee's death.

*Held*: that Ss. 5 and 14 were not applicable to the case, and as Ss. 6 and 7 of the Act did not extend to suits to enforce a right of pre-emption, the suit had been rightly dismissed. [P 26 C 1]

*Azim Ullah*—for Appellant.

**Judgment.** — *Mt. Husain Bibi* sued to pre-empt certain land sold by her father to *Piran Ditta* and *Hakim* by deed of sale, dated 7th November 1913. The suit which was filed on 7th October 1914 purported to be against both vendees, but it was subsequently discovered that *Piran*

(1) [1907] 9 Bom. L. R. 715.

(2) [1906] 33 Cal. 1047=33 I. A 165 (P. O.).



Ditta, one of the joint vendees, had died previously to the institution of the suit, and it was not till 8th December 1914 that heirs were impleaded as co defendants with Hakim. The District Judge has dismissed the claim as time barred, on the ground that the sale was one jointly in favour of the vendees, and the suit, being barred against the representatives of Piran Ditta, is equally barred against Hakim. Plaintiff has appealed to this Court and on her behalf it is urged that she was a minor at the time of suit and that neither she nor her husband, who was acting as her next friend, had any knowledge of Piran Ditta's death. But even if we assume that such was the case, we do not see how plaintiff can be granted an extension of time, as Ss. 5 and 14, Lim. Act, are not applicable and the provisions of Ss 6 and 7 do not extend to suits to enforce a right of pre-emption. The suit has accordingly been rightly dismissed as time barred and we must reject this appeal.

R.M./R.K.

*Appeal dismissed.***A. I. R. 1919 Lahore 26**

RATTIGAN, C. J.

*Asa Ram Kalu Ram and another—*  
Plaintiffs—Petitioners.

v.

*Bakhshi Ram Kanahya Ram—*  
Defendant—Opposite Party.

Civil Revn. Petn. No. 329 of 1917, Decided on 2nd July 1919, against order of Dist. Judge, Ludhiana, D/- 3rd January 1917.

Civil P. C. (5 of 1908), S. 20 and O. 7, R. 10—  
Contract entered into by telegram—Cause of action arises where telegram is received—  
Court is competent to consider question of jurisdiction suo motu—Order directing presentation of plaint to proper Court can be made at any stage of suit.

Plaintiffs, carrying on business at Khanna in the Ludhiana District, sent an order by telegram to defendants, residing and carrying on business at Khamgaon in the United Provinces, to purchase cotton seeds on their behalf. Defendants wired back informing the plaintiffs that the cotton seeds would be purchased and sent, but they sent only a part, withholding the remainder as the price had gone up. Thereupon the plaintiffs filed a suit at Ludhiana for the recovery of the balance of the amount paid by them as well as damages for nondelivery:

*Held*: (1) that the Court was competent to consider the question of jurisdiction suo motu and to return the plaint at any stage of the suit for presentation to a Court in which the suit should have been instituted; (2) that the contract must be taken to have been made at Khamgaon where the defendants carried on their business

and where they received the plaintiffs' telegram and that the Ludhiana Court did not have jurisdiction to entertain the suit. 76 P. R. 1896, Foll. [P 27 C 1]

*Hargopal for Jai Gopal Sethi—*for  
Petitioners.

*Amar Nath Chona—*for Opposite Party.

**Judgment.**—The allegations in the plaint are as follows: That two firms Asa Ram Kalu Ram and Nand Ram-Salig Ram carry on business at Khanna; that they jointly sent an order by telegram from that place to defendants to purchase cotton seeds on their behalf; that defendants replied by telegram to plaintiffs at Khanna to the effect that the cotton seeds would be purchased and sent to plaintiffs at Khanna; that in compliance with the terms of the agreement defendants purchased some 8,000 bags of cotton seeds for the plaintiffs, but sent only 2,681 bags, and failed to send the remainder of the bags because the rate of cotton seeds had gone up. The plaintiffs accordingly sued the defendants for a sum of Rs. 1,106-10-9, being the balance of the amount sent by plaintiffs to defendants, and the sum of Rs. 1,095-6-0 as damages for loss by reason of the failure to supply the remaining bags of cotton seeds. The plaintiffs alleged that the suit was cognizable by the Court in which it was instituted, namely, the Court of the Senior Subordinate Judge, Ludhiana. The defendants did not appear in the case, but the Senior Subordinate Judge suo motu took up as a preliminary issue the question whether the Court at Ludhiana had jurisdiction to try the suit. He held that the Court had no such jurisdiction and that the cause of action arose either at Sirhind in the Patiala State or at Khamgaon in the United Provinces where the defendants reside and carry on business. He accordingly returned the plaint to the plaintiffs for presentation to the proper Court. This order was upheld by the District Judge on appeal and the plaintiffs have applied to this Court for revision.

Mr. Hargopal on behalf of the plaintiffs urged that the Court ought not to have taken up the question of jurisdiction suo motu; but upon this point I have no hesitation in holding that the Court acted in accordance with law. The plaintiffs alleged that the cause of action arose within the jurisdiction of the Court, and before the Court could adjudicate on the



suit it had obviously to consider whether, upon the allegations made in the plaint it had jurisdiction to entertain the suit. O. 7, R. 10, Civil P. C., is clear upon the point and gives the Court power to return the plaint at any stage of the suit for presentation to a Court in which the suit should have been instituted.

As to the question whether the Court at Ludhiana had jurisdiction or not, it appears to me that the decision of Chatterji, J., in *Muhammad Shaffi v. Karamat Ali* (1), which I have no hesitation in following, is conclusive upon the point. The contract according to that decision must be taken to have been made at Khamgaon where the defendants carried on their business and where they received the telegram from the plaintiffs, and it is quite clear that the delivery of the bags of cotton seeds was to be made to the railway at that place for conveyance to plaintiffs at Khanna. The rulings cited by Mr. Hargopal, *Premji Khetsey v. Ghulam Sarwar Khan* (2) and *Boseck & Co. v. Mandleston* (3), are clearly distinguishable, inasmuch as the question of jurisdiction was in those cases decided by a reference to either the previous practice obtaining among the parties or an express agreement between them as to the place where the money under the contract was to be paid. In the present case the money for the cotton seeds would be paid in the ordinary course of things to defendants at their place of business and the mere fact that the money was remitted from Khanna would not affect the question of jurisdiction.

I hold accordingly that the Courts below were right in returning the plaint to the plaintiff for presentation to the Court either at Khamgaon or at Sirhind, and I reject this petition with costs.

R.M./R.K.

*Petition rejected.*

(1) [1896] 76 P. R. 1896.

(2) [1908] 86 P. R. 1908.

(3) [1906] 70 P. R. 1906.

## A. I. R. 1919 Lahore 27

SCOTT-SMITH, J.

*Kishen Lal and others*—Petitioners.

v.

*Jai Lal and others*—Opposite Parties.

Civil Revn. Petn. No. 153 of 1918, Decided on 26th June 1919, against decree of Sub-Judge, Second Class, Hissar, D/- 29th October 1917.

(a) Civil P. C. (1908), S. 24—Power to transfer cases can be delegated by District Judge to Subordinate Judge—It must be exercised in accordance with law and in regard to cases pending in Subordinate Courts.

The power to transfer cases under S. 24, Civil P. C., can be delegated by the District Judge to a Subordinate Judge, but when so delegated it must be exercised in accordance with law. It can only be exercised in regard to cases pending in a Court subordinate to the Court exercising the power. A Senior Subordinate Judge cannot transfer a case from his own Court to that of the Junior Subordinate Judge as the Court of the latter is not subordinate to him. [P 25 C 1, 2]

(b) Civil P. C. (1908), S. 21—Court possessing jurisdiction over subject-matter—Procedure prescribed not complied with—Defect may be waived.

Where there is jurisdiction over the subject-matter, but noncompliance with the procedure prescribed as essential for the exercise of jurisdiction, the defect might be waived. [P 29 C 1]

(c) Civil P. C. (1908), S. 24, Sch. 2, Para. 8—Senior Subordinate Judge cannot transfer case to Junior Subordinate Judge—Parties acquiescing in jurisdiction cannot subsequently object to it—Court becoming seised of case can extend time for filing award and such award is valid.

The parties to a suit agreed to refer the dispute to arbitration. After the arbitration, but before the award, the Junior Subordinate Judge, in whose Court the case was pending, took leave for two months on 25th April 1916. No one was appointed in his place, and on 2nd May 1916, the Senior Subordinate Judge ordered that the case should be kept in his Court. The award not having been filed within the time originally fixed, several extensions were granted. On 10th October the case was retransferred by the Senior Subordinate Judge to the Junior Subordinate Judge on his return from leave, and on the same date at the request of the parties further time was allowed. Time was again extended several times and eventually the award was filed on 9th January 1917, and a decree was passed in accordance with the award. The defendants applied for revision:

*Held*: (1) that the order of the Senior Subordinate Judge retransferring the case to the Junior Subordinate Judge was ultra vires; (2) but that the parties, having acquiesced in the jurisdiction of the Junior Subordinate Judge, after the case was retransferred to him, could not subsequently object to it; (3) that when once the Court became seised of the case, it had full power to extend the time for filing the award, even though the time originally fixed had previously expired; and (4) that consequently the award was a valid one and the Court was right in passing a decree in accordance therewith.

[P 29 C 1, 2]

*Sheo Narain and Shamair Chand* for *Ram Chand Manchanda*—for Petitioners.

*Muhammad Shafi, Nanak Chand and Mehr Chand Mahajan* for *Tek Chand*—for Opposite Parties.

**Judgment.**—This an application for revision of the order of the Subordinate



Judge, Second Class, Hissar, passing a decree in plaintiffs' favour in accordance with an award after rejecting defendants' objections. Notice issued on the second ground only in which it is contended that the award, not having been made within the time allowed by the Court referring the matter to the arbitrators was a nullity in law. The case was pending in the Court of Pandit Gulal Chand, Junior Subordinate Judge of Hissar, who on 25th April 1916, after the matter had been referred to arbitration and before the award was filed, took two months' privilege leave. No successor was appointed in his place, and on 2nd May 1916 the Senior Subordinate Judge recorded an order that the case should be kept in his Court. The award not being filed within the time originally fixed an extension of time was granted on the following dates: 8th and 31st May, 30th June and 27th July. On 10th October the case was retransferred by the Senior Subordinate Judge to Pandit Gulal Chand who had previously returned from leave, and on the same date in the presence and at the request of the parties time for filing the award was extended by that officer up to 15th November. Time was again extended to 18th December, to 8th January 1917, and to 9th January 1917, on which latter date the award was filed. Objections to the award were subsequently put in and having been disposed of, the Senior Subordinate Judge passed the order of which revision is now sought.

There is nothing to show that the Senior Subordinate Judge had the power to transfer the case to his own Court after the departure of Pandit Gulal Chand on leave. The distribution of civil work amongst subordinate Courts is frequently in this Province delegated by the District Judge to the Senior Subordinate Judge, and it is probable that this delegation was made in Hissar, for we find that when this suit was originally instituted, it was made over by the Senior Subordinate Judge to the Junior Subordinate Judge. The power to transfer cases under S. 24, Civil P. C., can also be delegated by the District Judge to a Subordinate Judge, but there is no evidence before me, and I have been unable to ascertain, that the Senior Subordinate Judge of Hissar was invested with the powers under S. 24, Civil P. C. Even if

he was, those powers must be exercised in accordance with law. S. 24 (1) (a) enables a Court to exercise such powers to transfer any suit pending before it for trial or disposal to any Court subordinate to it. Similarly S. 24 (1) (b) enables a Court to withdraw any suit pending in any Court subordinate to it and to transfer the same for trial or disposal to the Court from which it was withdrawn. The power can only be exercised in regard to cases pending in a Court subordinate to the Court exercising the power, and I do not think that the Senior Subordinate Judge could in any event have transferred a case of his own Court to that of the Junior Subordinate Judge, which is not subordinate to him within the meaning of the section. It seems therefore that the order of 10th August retransferring the case to the Court of the Junior Subordinate Judge was *ultra vires*. Mr. Mahomed Shafi on behalf of the respondents urges that if we are to consider that one of the orders of transfer was wrong, we are to consider that they both were wrong. If they were both wrong, then the orders passed between the time when Pandit Gulal Chand went on leave and the time when he again became seized of the case are all *ultra vires*, and when he again became seized of the case he had full power to extend the time for filing the award, even though the time for filing it originally fixed had previously expired: see Sch. 2, Para. 8, Civil P. C.

He also points out that this very objection as to jurisdiction was raised before the lower Court and was decided by it against the present petitioner and that whether it decided it rightly or wrongly it had jurisdiction to decide it and the mere fact that it decided it wrongly is no ground for revision by this Court. There appears to be considerable force in this argument; but, in my opinion, his strongest argument is that the parties, having acquiesced in the jurisdiction both of the Senior Subordinate Judge during Pandit Gulal Chand's absence and of Pandit Gulal Chand after the case was retransferred to that officer, cannot now object thereto. In this connexion he has referred *inter alia* to *Gurdeo Singh v. Chandrikah Singh* (1). It is pointed out there that distinction has often been drawn between elements which are es-

(1) [1903] 36 Cal. 193=1 I. C. 913



essential for the foundation of jurisdiction and the mode in which such jurisdiction has to be assumed and exercised. It is said that the distinction is well founded and the case of *Pisani v. Attorney-General of Gibraltar* (2) is referred to wherein their Lordships of the Judicial Committee held :

"that, where there is jurisdiction over the subject-matter, but noncompliance with the procedure prescribed as essential for the exercise of jurisdiction, the defect might be waived."

It is said:

"the same principle was adopted in *Pratt, Ex parte* (3) and *May, Ex parte* (4) which are authorities for the proposition that where jurisdiction over the subject-matter exists requiring only to be invoked in the right way, the party who has invited or allowed the Court to exercise it in a wrong way cannot afterwards turn round and challenge the legality of the proceedings due to his own invitation and negligence."

It is further stated :

"that defects of jurisdiction arising from irregularities in the commencement of the proceedings may be waived by the failure to take objection at the proper stage of the proceedings : see the rulings quoted at the top of the p. 208 (of *I.L.R.* 86 Cal.) of the same volume."

Now, in the present case there can be no doubt that the lower Court had jurisdiction over the subject-matter of the present case, and the only objection urged is that there was noncompliance with the procedure prescribed as essential for the exercise of the jurisdiction, viz., that the case had not been transferred to that Court by the District Judge who was the only officer authorized to make such transfers. There is however the authority referred to above in support of the proposition that any defect of jurisdiction arising from such an irregularity may be waived. Now, in the present case we find that on each date on which time was extended the parties were present either in person or by pleader or by agent, and they not only never objected to the jurisdiction of the Court but joined in requesting that time should be extended. In these circumstances it is quite clear that the plaintiffs submitted to the jurisdiction of the lower Court and raised no objection to the irregular way in which the Court had become seized of the case. I therefore hold that this objection to jurisdiction cannot be listened to now. The time for making the award had been duly extended from time to time in accordance with the pro-

visions of R. 8, Sch. 2, Civil P. C. The award therefore was a valid award and the lower Court was right in passing a decree in accordance therewith. The application for revision accordingly fails and is rejected with costs.

R.M./R.K.

*Application rejected.*

## A. I. R. 1919 Lahore 29

WILBERFORCE, J.

*Emperor*

v.

*Asghar Ali—Accused.*

Criminal Revn. No. 1161 of 1918, Decided on 7th January 1919, from order of Dist. Magistrate, Karnal, D/- 3rd October 1918.

**Criminal P. C. (1898), S. 439—High Court can enhance only legally passed sentence—Sentence for period already undergone in lock up is not legal sentence.**

The High Court can interfere, under S. 439 to enhance a sentence, only in those cases in which a legal sentence has been passed. A sentence for a period already undergone in the lock up is not a legal sentence. [P 30 C 1]

**Facts.**—Lieutenants C. Reynolds and N. Walkar, while travelling from Simla to Delhi by train, were robbed of their articles. The former was robbed on the night between 19th/20th July and the latter on the night between 1st/2nd August 1918. The accused was travelling without tickets in the same trains as the complainants. Last time when arrested he was searched and found in possession, besides the articles of stolen property, of two 1st class tickets from Simla to Delhi, which apparently belonged to the complainants. He was charged under S. 411, I. P. C., and sentenced to imprisonment for the period already passed by him in the lock-up.

**Grounds.**—The sentence is perfectly absurd. So is the conviction under S. 411 instead of S. 379. The thief is proved to have been on the trains on both nights on which the thefts were committed, he is also found in possession of the two 1st class tickets stolen besides other property. How could he have obtained the 1st class tickets unless he himself had stolen them? They are worth nothing and no one would 'receive' them. I think the accused should have been sentenced to one year's imprisonment at least. There are two separate thefts which show the man is a habitual train thief. The case must go up for enhancement of punishment.

(2) [1874] 5 P. O. 516.

(3) [1864] 12 Q. B. D. 334.

(4) [1864] 12 Q. B. D. 497.



**Judgment.**—In this case the accused has been sentenced in two cases by a Magistrate to imprisonment for the period which he had already passed in the lock-up. The District Magistrate has referred the case to this Court with a recommendation for enhancement of the sentences. I regret however that I am unable to take action as no legal sentence has been passed and the provision of S. 439, Criminal P. C., only refers to such sentences *Bhagel Singh v. Crown* (1) is an authority that a sentence for a period already undergone is not a legal sentence. I am therefore compelled to remand the case to the Magistrate with directions that he shall pass sentences in accordance with law upon the accused.

R.M./R.K. *Case remanded.*

(1) [1907] 9 P. W. R. 1907, Cr.

### A. I R. 1919 Lahore 30

ABDUL RAOOF, J.

*Mangat Rai*—Petitioner.

v.

*Alia and another*—Opposite Parties.

Civil Revn. No. 996 of 1917, Decided on 24th January 1919, from order of Sub-Judge, 2nd Class, Hissar, D/- 20th June 1917,

(a) Civil P. C. (1908), S. 35—Two defendants jointly represented by one pleader—Suit against one dismissed with costs and as against other decreed with costs—Judgment silent as to apportionment of costs—Court should be held to have allowed half counsel's fee to successful defendant.

Where two defendants are jointly represented by one pleader, and the suit as against one is dismissed with costs and as against the other decreed with costs, and the judgment is silent as to how the costs are to be apportioned, the reasonable construction to be put upon the judgment is that the Court intended to allow half the counsel's fee to the successful defendant.

[P 31 C 1]

(b) Civil P. C. (1908), Ss. 151, 152—Courts can amend or vary decrees to bring in conformity with judgments, although they do not fall within S. 152.

The Courts in India have an inherent power to amend or vary decrees so as to bring them into accordance with the judgments, after they are signed by the Judges, even if they do not fall within S. 152, Civil P. C.

[P 31 C 1]

*Nanak Chand*—for Petitioner.

*Badr-ud-Din Kureshi*—for Opposite Parties.

**Judgment.**—This application for revision should be allowed. The facts out of which it has arisen are these: one Mangat Rai, plaintiff, brought a suit for the recovery of Rs. 3,000 on book ac-

count against Alia, defendant 1, and defendant 2, Fattah Muhammad, the son of defendant 1. Both the defendants engaged one counsel. Lala Gulal Chand, the Subordinate Judge of the Second Class, decreed the suit as against defendant 2 with costs and dismissed it with costs as against defendant 1 on 7th October 1916. The order was made in these words:

"On the above findings plaintiff seems entitled to a decree for Rs. 1,663, principal, and Rs. 856-5-0, interest, total Rs. 2,519-5-0, with costs in proportion against defendant 2, Fattah Muhammad only; and I decree accordingly and dismiss the rest of the claim and discharge Alia, defendant 1, whose costs will be paid by the plaintiff."

The decree-writer entered Rs. 150 as the costs of Alia on account of the counsel's fee in the case. The present petitioner made an application in the lower Court for the amendment of this decree, on the ground that, according to the correct interpretation of the judgment, only half the counsel's fee must be taken to have been decreed by the Court to Alia and the decree had been wrongly prepared inasmuch as Rs. 150, namely the entire sum taxable on Rs. 3,000, had been allowed to him in the decree. The learned Subordinate Judge disallowed the application. The petitioner has come up in revision to this Court.

It is argued on his behalf that the learned Subordinate Judge has wrongly refused to amend the decree and has thus committed an illegality in the exercise of his jurisdiction. The real question which I have to decide in this case is whether the decree is, as a matter of fact, at variance with the judgment. Now it is quite clear that there is no specified amount of costs decreed by the judgment in the case to any of the parties. I have then to decide the question what was really intended by the Court that gave that judgment? A very similar question arose in the case of *Beaumont v. Senior* (1). His Lordship, the Chief Justice, Lord Alverstone, observed thus in that case:

"It may be that where two defendants are jointly represented by the same solicitor, and it is agreed between them that one of them shall be liable to the solicitor for all the costs of the defence, then in the event of the other defendant being successful in the action he cannot recover any costs from the plaintiff, not being liable to his solicitor for them; otherwise the successful defendant would be in the position of receiving costs from the plaintiff which he had not in-

(1) [1903] 1 K. B. 282.



curring in defending the action and to which, therefore he was not entitled."

Further on he observed :

"In the absence of any agreement between the two defendants as to how the costs of the defence were to be borne, it is clear, on the authority of the cases to which we have been referred, that each of the two defendants is liable to their solicitor for half the costs of the defence, and that will be the amount of costs which the plaintiff will have to pay the successful defendant."

In this case also the reasonable construction to be put upon the judgment is that the Court intended to allow half the counsel's fee to the successful defendant. It is contended on behalf of the respondents that this application for amendment of the decree cannot be entertained because it does not come strictly, within S. 152, Civil P. C. In my opinion this contention has no force. When a decree is at variance with the judgment, it has always been held that the Court has got an inherent power to correct the mistake in the decree. It was so decided in the case of *Brijraian v. Jaynarain* (2). The head-note of that case runs thus :

"The Courts in India have an inherent power to amend or vary decrees so as to bring them into accordance with the judgments, after they are signed by the Judges, even if they do not fall within S. 152, Civil P. C. (Act 5 of 1908)."

In accordance with the rule laid down in this case, I set aside the judgment of the lower Court and order that the decree be amended and brought into conformity with the judgment and only half the counsel's fee be allowed to Alia, defendant 1. This application for revision is therefore allowed with costs in both the Courts.

R.M./R.K. *Application accepted.*

(2) [1910] 37 Cal. 649=7 I. C. 876.

### A. I. R. 1919 Lahore 31

MARTINEAU, J.

*Parbhu Ram*—Plaintiff—Appellant.

v.

*Tek Chand*—Defendant—Respondent.

Second Appeal No. 72 of 1919, Decided on 21st July 1919, from decree of Dist. Judge, Ambala, D/- 12th January 1919.

(a) *Transfer of Property Act* (1882), S. 109—"Transferee of any interest"—Lessee is included.

The words "transferee of any interest" in S. 109 include the term lessee. [P 32 C 1]

(b) *Transfer of Property Act* (1882), S. 106—Person entitled to immediate reversion can give notice to quit.

The rule of English law that the person entitled to the immediate reversion of the demised

premises is the proper person to give notice to quit is applicable to India 43 I. C. 210, *Poll.*

[P 32 C 1]

(c) *Transfer of Property Act* (1882), Ss. 106 and 109—Landlord is not bound to inform tenant of assignment—Assignee of landlord's interest can give notice to quit.

In a suit for recovery of rent and ejectment from the house it appeared that the defendants were monthly tenants of a house belonging to one H. On 1st October 1917 H. leased the house to the plaintiff, who on 10th February 1918 gave defendants a notice to vacate the house before 6th March. The defendants refused to recognize plaintiff as their landlord:

*Held:* that the plaintiff was entitled to serve the defendants with a notice to quit the house and that it was not necessary for the landlord to inform the defendants that he had leased the house to the plaintiff. [P 32 C 1]

*Mehr Chand Mahajan* for *Jagan Nath*—for Appellant.

*Balwant Rai*—for Respondent.

**Judgment.**—The defendants are monthly tenants in a house belonging to Hari Pershad. The latter leased the house to the plaintiff on 1st October 1917. The plaintiff on 16th February 1918 gave the defendants a notice to vacate the house before 16th March. The defendants replied that they had no knowledge of the plaintiff's lease, and that they did not recognize him as the landlord. Then at the plaintiff's instance the owner of the house sent a notice to the defendants on 23rd March to quit the house in a week. As the defendants did not comply with the notice, the plaintiff brought the present suit for ejectment and for Rs. 79-12-0 on account of rent. The first Court passed a decree for ejectment and for Rs. 17-14-6 on account of rent. On the defendants' appeal the District Judge altered the decree for rent to one for Rs. 19-2-0, and dismissed the claim for ejectment. The plaintiff has appealed to this Court. The only question is as to the validity of the notice given by the plaintiff on 16th February 1918, as it is not contended on his behalf that the notice given by the landlord on 23rd March to quit the house in a week was a valid one. The learned District Judge holds that the defendants were not obliged to accept any one as their new landlord without due intimation from the old landlord, and that they were therefore entitled to treat the notice of 16th February as a nullity. This is not a correct view. It is laid down on p. 1701 of *Gour's Law of Transfer*, Edn. 4, that no notice is required to be given of an assignment, and Counsel for the respondents.



has not cited any authority to the contrary.

As to the right of the plaintiff to give the defendants notice to quit, this appears to be clear from S. 109, T. P. Act. A lease of immovable property, is, as is defined in S. 105, a transfer of a right to enjoy such property, and S. 109 provides that if the lessor transfers the property leased or any part thereof or any part of his interest therein, the transferee, in the absence of a contract to the contrary, shall possess all the rights of the lessor as to the property transferred. It has also been held in *Manikkam Pillai v Rathnasami Nadar* (1) that the rule of English law that the person entitled to the immediate reversion of the demised premises is the proper person to give notice to quit is applicable to India, and that the words "transferee of any interest" in S. 109, T. P. Act include the term lessee. Counsel for the respondents relies on the words "in the absence of a contract to the contrary" in S. 109, and contends that by the terms of the plaintiff's lease, it was only his lessor who could have the tenant ejected, and that therefore he alone, and not the plaintiff, could give notice to the defendants to quit. I do not agree with this contention. The material words in the lease executed by the plaintiff are:

*"Jo kirayadar is wakt abad hain un se makan khali karane ka aur kiraya wasul karne ka mujh ko ikhtiyar hoga, agar koi makan khali na kare to malik ko khali karakar dena hoga, aur in makanat ka main wuh kiraya lene ka mustahik hunge jo kirayadar se milega, aur khali karane ke bad ziyadati kiraya ka aur tobdili kirayadaran ka mujh ko ikhtiyar hoga."*

The first sentence clearly gives the plaintiff the right to eject the tenants, and that right is not taken away by the second sentence, which gives the plaintiff the further right, where a tenant refuses to quit, of calling upon the owner to eject him. I hold therefore that the plaintiff was entitled to serve the defendants with a notice to quit the house, and that it was not necessary for the landlord to inform the defendants that he had leased the house to the plaintiff. It is argued finally for the defendants that the notice, in order to be valid, must be for a period expiring at the end of the month of the tenancy, that it is not shown that the tenancy ended on 15th of the month, and that therefore

the notice given to the defendants on 16th February to quit the house before 16th March was not a valid notice. The defendants are however not entitled to set up this defence now, as they did not set it up at the trial. Had the plea been raised at the trial, the plaintiff might have been able to prove that the defendants' tenancy ended on 15th of the month. The notice must be held to be valid, and I accordingly accept the appeal and give the plaintiff a decree for the ejectment of the defendants from the house in addition to the decree for Rs. 19-2-0 passed by the lower appellate Court. The defendants will pay the plaintiff's costs in proportion to the decree in the first Court, and full costs in the lower appellate Court and this Court.

R.M./R.K

*Appeal accepted.*

### A. I. R. 1919 Lahore 32

SHADI LAL, J.

*Mahomed Hussain and another—Defendants—Petitioners.*

vs.

*Mahomed Usman and others—Plaintiffs—Opposite Parties.*

Civil Revn. No. 171 of 1919, Decided on 18th July 1919, from order of Dist. Judge, Delhi, 11th November 1918.

Civil P. C. (1908), O. 41, Rr. 19 and 21—**Appeal dismissed in default—Application for review of order dismissing appeal and for setting aside ex parte order deciding cross-objections—Order dismissing applications is not appealable and revision is competent.**

A decree for redemption of a garden having been passed against two minors, they appealed to the District Judge praying for enhancement of the amount awarded to them, while the plaintiffs preferred cross-objections contending that they were entitled to the possession of the property without any payment at all. The minors' appeal was dismissed for default and the cross-objections were accepted ex parte. The defendants then made two applications, one for a review of the order dismissing the appeal in default and the other for setting aside the ex parte order deciding the cross-objections. Both these applications having been rejected, the defendants preferred an application for revision in the High Court.

*Held:* (1) that neither of the orders dismissing the two applications was appealable and that the defendants were competent to make an application for revision; (2) that inasmuch as the next friend of the minor defendants had not been served with a notice of the date fixed, the order of dismissal of appeal for default was prejudicial to the minors and could not be sustained.

[P 33 C 1]

*Moti Sagar—for Petitioners.*

*Balwant Rai—for Opposite Parties.*



**Judgment.**—On 26th June 1916 the Subordinate Judge of Delhi passed against two minors, Muhammad Hussain and Basir Hussain, a decree for the redemption of a garden on payment of Rs. 3,796. The minors preferred an appeal to the District Judge praying for enhancement of the amount to be awarded to them, and the plaintiffs preferred cross-objections contending that they were entitled to the possession of the property without payment of any money to the defendants. On 1st June 1918 the District Judge dismissed the minor's appeal for default of prosecution: and on the 17th September 1918 he accepted the cross-objections *ex parte*, and reduced the amount to be paid to the defendants to Rs. 84-12-0. On 11th October 1918 the defendants made two applications one, for a review of the order dismissing the appeal in default and the other for setting aside the *ex parte* order deciding cross-objections in their absence. Both these applications were rejected on 11th November, and against the orders thus passed the defendants have preferred to this Court an application for revision.

Mr. Balwant Rai for the respondents raises a preliminary objection that the application for revision does not lie, because the orders complained of were appealable to this Court. This objection appears to me to be wholly untenable. As stated above, the defendants applied for a review of the order of dismissal for default, and I cannot treat their application as an application under O. 41, R. 19, for the re-admission of the appeal. In the same way an application for rehearing the cross-objections decided *ex parte* cannot be viewed as an application under O. 41, R. 21, for the rehearing of an appeal which has been heard in the absence of the respondents. I must hold that neither of the orders passed on 11th November was appealable and that the defendants are competent to make an application for revision. On the merits I have, after perusing the various orders passed by the District Judge prior to 1st June 1918, reached the conclusion that the minors' appeal should not have been dismissed for default. There can be little doubt that their next friend, who was their father, had not been served with a notice of the date fixed for the hearing of the appeal after the remand by the Chief Court, and, considering that the

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appellants were minors, the District Judge should have appointed another person to prosecute the appeal, if he was of opinion that their father was intentionally avoiding the service of the notice. It is the duty of the Court to protect the interests of the minors, and I do not think that I can endorse the order of dismissal for default which is obviously prejudicial to the minors. I must therefore set it aside, and direct the District Judge to hear the appeal on the merits. It appears that one of the appellants has now become *sui juris* and can prosecute the appeal on his behalf and can also act on behalf of his minor brother.

As regards the *ex parte* hearing of the cross-objections, it is sufficient to say that the point involved in both the appeal and the cross-objections is the same, viz., the amount to be paid by the mortgagors to the mortgagees. In these circumstances I consider it unnecessary to refer to the irregularity in the procedure of the lower appellate Court to which the learned vakil for the petitioners has invited my attention, because it is obvious that the appeal preferred by the minors cannot be adjudicated upon, as long as the decision accepting cross-objections remains undisturbed. There can be no doubt that both the appeal and the cross-objections should be decided together, and I direct the District Judge accordingly. I leave the parties to bear their own costs in this Court.

R.M./R.K.

*Case remanded.*

### A. I. R. 1919 Lahore 33

CHEVIS, J.

*Thamman Singh*—Defendant — Appellant.

v.

*Sant and another*—Plaintiff and Defendants—Respondents.

Second Appeal No. 1709 of 1918, Decided on 16th February 1919.

(a) Custom (Punjab)—Alienation—Ancestral land sold to pay off father's debts—Sale cannot be avoided.

A man who has sold a portion of his ancestral land to pay off his father's debts cannot subsequently avoid the sale merely on the plea that the sale was not for necessity. [P 84 C 2]

(b) Custom (Punjab)—Alienation of ancestral land by mother to pay off father's debts—Property can be recovered by minor son without being made to pay anything.

A minor however is not bound to recognize his father's debts as a charge on the ancestral land



and therefore where a portion of a minor's ancestral land is sold by his mother to pay off his father's debts, the minor is entitled to recover the property without being made to pay anything. [P 34 C 2]

*Sheo Narain*—for Appellant.

*Nanak Chand*—for Respondents.

**Judgment.**—On 12th June 1911 the land in suit was sold to Thamman Singh for Rs. 814 by a registered deed of sale executed by Santa and his mother Mt. Kahno, the latter acting on behalf of her minor son, Ramditta. Ramditta and Santa now sue to recover the land, alleging that the sale was without necessity and not for the benefit of the minor. The lower Courts have found that the sale was executed in order to pay off debts due by the father of Ramditta and Santa. As regards Santa, it is clear that he was a major at the time of the sale but the lower Courts regard him as a simpleton, who was under the thumb of his father's creditor and think that he was overreached and acted under undue influence. As to Ramditta, the lower Courts hold that he is not liable as the consideration for the sale was merely unsecured debts left by his father for which the ancestral land was not chargeable. The first Court held that the plaintiffs should refund the benefit which they have received and gave a decree for possession on payment of Rs. 814. The learned District Judge on appeal held, that there was no legal obligation on the plaintiffs to pay their father's debts and that there was no consideration for the sale, and so they were entitled to regain possession without any payment. The vendee appeals to this Court.

So far as Santa's share of the land is concerned, I think the decision of the lower Courts cannot stand. Santa no doubt had not long been a major when the sale deed was executed, but apart from the question whether by agricultural custom unsecured debts cannot be regarded as a charge on ancestral land, there is a moral obligation on a son to discharge his father's debts; and if the son chose to do so, I do not see how he can now turn round and seek to avoid the sale. I can find no evidence of any sort which in my opinion proves that Santa was overreached in any way. At the time when the sale deed was executed, it was the general impression that ancestral land was liable for the debts of the last owner, and though that impres-

sion has now been removed by the publication of *Jagdip Singh v. Bawa Narain Singh* (1), still even that ruling is no authority for the proposition that a man who has sold a portion of his land to pay off his father's debts can undo the sale merely on the plea that the sale was not for necessity. I note too that it is not a case of the whole estate being sold. It is admitted before me that plaintiffs have plenty of land left. The appeal must therefore succeed so far as Santa's share in the land is concerned. But as regards the share of Ramditta, who was a minor at the time of the sale, the decision seems to me to be correct.

The minor was not bound to recognize his father's debts as being a charge on the ancestral land, and his mother was not authorized to alienate the land in discharge of these debts. In fact all that counsel for the appellant urges as regards the share of Ramditta is that since this appeal was lodged, Ramditta has died sonless and is now represented by his brother Santa. So it is urged that Santa, having joined in the sale, cannot now seek to avoid it even as regards his brother's share. The only authority quoted in support of this is *Ram Chunder v. Ram Jeebun* (2). The facts of that case however were quite different from those of the present case, as in that case there was no question of a party dying during the pendency of appeal. It was rather a case of certain parties to a suit being held to be estopped by reason of their conduct during a previous suit. The appellant is seeking to set aside the decree of the lower Court, and in order to succeed, I think, he should be able to prove that that decree is in some way incorrect. So far as Ramditta's share is concerned, it is not contended that the decree passed was an incorrect one. It is merely urged that circumstances have since arisen which if they had arisen earlier would have altered the decree. This however in my opinion makes no difference to the correctness of the decree. If Ramditta had lived to the present day and subsequently died after recovering his share of the land, that share would undoubtedly have passed to his brother Santa and the present appellant would not have been able to claim that the

(1) [1912] 4 P. R. 1913=15 I. C. 866 (F.B.).

(2) [1869] 12 W. R. 427.



case should be reopened. So far then as Ramditta's share in concerned I think, the District Judge's decision is a correct one and I uphold it.

The result is that the appeal is accepted in part and the decree is reduced to one for possession of one-half of the land. The parties shall bear their own costs in all Courts.

R.M./R.K. *Appeal partly accepted.*

### A. I. R. 1919 Lahore 35

ABDUL RAOOF, J.

*Jiwana*—Defendant—Petitioner.

v.

*Malk Chand* — Plaintiff — Opposite Party.

Civil Revn. No. 819 of 1918, Decided on 18th February 1919, from decree of Senior Sub-Judge, Shahpur, D/- 13th May 1918.

Contract Act (9 of 1872), S. 23—Money paid under agreement opposed to public policy—Agreement unperformed—Money can be recovered.

A person who has paid money under an agreement which is void as opposed to public policy may recover back the money so paid while the agreement is still unperformed. [P 85 C 2]

Defendant Promised to marry his daughter to the plaintiff and on the faith of that promise the plaintiff paid a sum of money to the defendant. Subsequently the defendant refused to carry out the agreement and the plaintiff brought a suit to recover the amount paid by him to the defendant.

*Held*: that the plaintiff was entitled to recover the sum advanced by him inasmuch as the agreement, although void under S. 23 had not been performed. [P 85 C 2]

*Nand Lal*—for Petitioner.

*C. L. Gulati*—for Opposite Party.

**Judgment.**—The plaintiff brought a suit for the recovery of Rs. 300, with interest, on the allegation that on 14th December 1911 the defendant borrowed the sum under his signature in the plaintiff's *bahi*. Various pleas were raised by the defendant by way of defence to the suit. It has been found by both the Courts below that the defendant had promised to marry his daughter to the plaintiff and the plaintiff had made an advance of Rs. 300 on the faith of that promise. The Court of first instance passed a decree for the principal sum Rs. 300 only and did not allow any interest or costs to the plaintiff. Both the parties appealed to the lower appellate Court. Defendant's appeal was dismissed and the plaintiff's appeal was partly decreed, the appellate Court holding that

the plaintiff was entitled to costs also. The present petition for revision has been filed by the defendant, and it has been argued that the suit was not maintainable inasmuch as the contract to give the daughter in marriage was an illegal contract, and no suit could be based upon that contract. S. 23, Contract Act is relied upon. The suit on the face of it is not one for the enforcement of any illegal agreement. It is a suit merely for the non-performance of the promise on the part of the defendant. In support of his argument the learned counsel for the appellant relied upon *Hira v. Jowala Das* (1) and contended that inasmuch as the contract was illegal, the present suit was not maintainable. That was not what was held in that case. The learned Judge who decided that case based his judgment on the finding that a betrothal had taken place and that the promised girl had died before she could be married. He was of opinion that the agreement had partly been performed. The concluding words of his judgment are:

"Holding then that plaintiff advanced the money claimed to defendant as consideration for an illegal promise which was performed either in whole or in part, according to the view taken, I decide that the plaintiff is entitled to no relief and dismiss the appeal."

This decision was in full accord with the observation made by Plowden, J., in the case of *Kahna v. Kahn Singh* (2). That eminent Judge observed thus at p. 295:

"I have no difficulty however in holding that a person who has paid money under an agreement which is void as opposed to public policy, may recover back the money so paid while the agreement is still unperformed; although he cannot do so afterwards."

The decision of Mr. LeRossignol is in full accord with this opinion of Plowden, J. In the present case the defendant admitted that he had married his daughter to another man, and therefore he had disabled himself from performing the contract altogether. The plaintiff was therefore entitled to sue for the money advanced. The judgment of the Court below is therefore correct. The learned counsel has however argued that the suit was barred by three years' limitation. There is no force in this contention. In the first place the point does not appear to have been pressed in the lower appellate Court. A plea to this

(1) [1915] 27 I. C. 1008.

(2) [1879] 106 P. R. 1879.



effect was taken in the memorandum of appeal filed in the Court below, but it was evidently never pressed. There is no indication in the judgment of the lower appellate Court that any argument was addressed on the plea of limitation before that Court. I find that there was good reason for the plea not being pressed. The defendant was examined in this case and he deposed that he married his daughter to another man on 16th Maghar Sambat 1972. This date corresponded to 1st December 1915. The present suit was filed on 7th October 1916. It was therefore within time from the date of the breach of the contract. The application for revision must be dismissed and it is dismissed with costs.

R.M./R.K.

*Appeal dismissed.***A. I. R. 1919 Lahore 36**

SCOTT-SMITH, J.

*Sanun Ram and others*—Defendants—Appellants.

v.

*Allah Bakhsh and another*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 1923 of 1918, Decided on 24th March 1919, from decree of Dist. Judge, Multan, D/- 20th July 1916.

(a) Custom (Punjab)—Alienation—Mahomedans of Muzaffargarh District—Guardianship of minor devolves on eldest son—Alienation by guardian for necessity or legal purposes is valid.

Among Mahomedans of Muzaffargarh District, on the death of a father the guardianship of the person and property of his minor children devolves on his eldest son, if adult. Such guardian is entitled to alienate the property of the minor for payment of the debts of the minor's fathers, for the marriage or maintenance of the minor or for an object directly advantageous to the minor. [P 36 C 2]

(b) Riwajiam — Entries in, from strong piece of evidence of custom.

A riwajiam is a public record prepared by a public officer in discharge of his duties and under Government rules and therefore statements contained in a riwajiam which is not imperfectly compiled, form a strong piece of evidence in support of the custom affirmed therein even when they are unsupported by instances, provided they are not opposed to the general custom of the country. [P 37 C 1, 2]

*Govind Das*—for Appellants.

*Hargopal*—for Respondents.

**Judgment.**—In the suit out of which the present appeal arises the plaintiffs sued for possession of certain land alienated by their brother Ghulam Muhammad during their minority for Rs. 638, on the ground that the vendor was not a legal guardian and that the alienation

was not for their benefit. The first Court dismissed the suit, holding that Ghulam Muhammad was a lawful guardian and that the alienation was for valid necessity. In arriving at this conclusion it relied upon an entry in the riwajiam applicable to all Mussulmans of the district, to the effect that on the death of the father guardianship of the person and property of the minor children devolves on the eldest brother, if adult, and upon a further provision in the same riwajiam that a guardian may sell or mortgage property for the benefit of his ward, Sheikh Amir Ali, who heard the appeal, was of opinion that the entry in the riwajiam, which was unsupported by instances, was insufficient to prove the existence of the custom put forward by the defendants, and, accepting the appeal, decreed the plaintiffs' claim with costs throughout. He did not give any finding as to whether there was any necessity for the alienation or whether the minors had derived any benefit therefrom.

The present appeal has been filed upon a certificate granted by the present District Judge, and the question for decision is whether any custom exists contrary to the plaintiffs' personal law in virtue of which their brother as the lawful guardian of the minors had authority to alienate their land for a necessary purpose. Bhagat Govind Das, in arguing the case for the appellants, relies upon the Customary law of the Muzaffargarh District, compiled by Pandit Hari Kishen Kaul, Settlement Collector, in 1903. The section dealing with guardianship and minority and with the powers of guardians will be found at pp 24 to 26 of the compilation. The answer to question 2 given at p. 25 is as follows:

"All Mussalmans state: On the death of the father the guardianship of the person and the property of minor children devolves on the eldest brother if adult."

The answer to question 4 given at p. 26 is:

"A guardian may mortgage or sell the moveable or immovable property for payment of debts of his ward's father for the marriage or maintenance of the ward or for an object directly advantageous to the ward."

There is no exception given in respect of either of these answers, all tribes concurring in them. The author's preface shows that this volume of Customary law was compiled with great care and the author himself states that the Code



may be taken as an authoritative statement of the customs of the various tribes in the Muzaffargarh District. No doubt there are certain rulings of this Court which lay down that any entry in a riwajiam unsupported by instances is not of itself very strong evidence in proof of a custom. Counsel for the appellants however refers to *Beg v. Allah Ditta* (1) in which their Lordships held that the entry in the riwajiam in favour of the succession of a daughter's son whose father was a khanadamad, in preference to collaterals was a strong piece of evidence in support of such custom which it lay upon the plaintiff's collaterals to rebut. The entry in the riwajiam produced in that case was also unsupported by instances, but their Lordships of the Privy Council pointed out that it was a public record prepared by a public officer in discharge of his duties and under Government rules, and that the statements contained in it formed a strong piece of evidence in support of custom. This judgment was considered by a Division Bench of this Court in the case reported as *Wazira v. Maryan* (2), wherein it was held following *Chhuttan v. Hazari Lal* (3), that statements in a riwajiam when opposed to general custom can carry very little weight unless supported by instances and that consequently the entries in the riwajiam of the Gujranwala District in favour of the special custom relied on by the plaintiff's collaterals unsupported by instances were insufficient to establish that custom, such riwajiam havin gmoreover been imperfectly compiled.

Now in the present case it cannot be said that the riwajiam was imperfectly compiled. Moreover according to custom generally prevailing in the Punjab a guardian in the case of Hindus and Sikhs can alienate his ward's property for a necessary purpose. It can hardly be said that the custom alleged in the present case is one contrary to the ideas as generally prevalent amongst agriculturists in this province. The custom is certainly contrary to the personal law of Mahomedans, but following the Privy Council ruling *Beg v. Allah Ditta* (1), I must hold that the entries in the

Muzaffargarh riwajiam set forth above are strong evidence in proof of the existence of the alleged custom and are quite sufficient to shift the onus on to the plaintiffs. The plaintiffs have no doubt produced a judicial decision dated 25th June 1912 which is in their favour, but it is only one by a Munsif in which it was held that it had not been proved to the effect that a brother was guardian by custom. The Munsif in that case referred to the fact that the entry in the riwajiam was unsupported by instances. The oral evidence produced by the parties is not of much importance, and I hold that the onus has been shifted on to the plaintiffs and that they have not discharged it. I therefore accept the appeal and setting aside the order of lower appellate Court remand the case thereto for rededecision of the appeal. It will be necessary for it to come to a finding on the question of necessity. Stamp in this Court will be refunded and other costs will be costs in the case.

R.M./R.K.

Appeal accepted.

### A. I. R. 1919 Lahore 37

SHADI LAL, J.

*Maqbul Ahmad*—Accused—Petitioner.  
v.

*Emperor*—Opposite Party.

Criminal Revn. No. 407 of 1919, Decided on 21st July 1919, from order of Dist. Magistrate, Karnal, D/- 21st February 1919.

(a) Criminal P. C. (1898), Ss. 202 and 476—No evidence recorded except statement of complainant—No reasons recorded for holding complaint as false—Order for prosecution under Penal Code, S. 211 is not justified.

It is doubtful whether an investigation under S. 202 can be regarded as a judicial proceeding and may be used for supporting an order under S. 476 of the Code.

Where a Magistrate did not himself give any reasons for holding that a complaint was false and did not record any evidence except the statement of the complainant, and proceeding entirely upon the result of the investigation, under S. 202, ordered the prosecution of the complainant under S. 211, I. P. O.

Held : that the order could not be sustained.

[P 38 C 1]

(b) Criminal P. C. (1898), S. 476—Complainant not allowed to adduce his evidence—Strong reasons are necessary to justify order under S. 476.

Where a complainant is not allowed to adduce the whole of his evidence in support of his complaint, exceptionally strong reasons are required to justify an order against him under S. 476.

[P 38 C 1]

(1) A. I. R. 1916 P. O. 129=44 Cal 749=44 I. A. 89=38 I. O. 354 (P. O.).

(2) [1917] 84 P. R. 1917=42 I. O. 958.

(3) [1915] 7 P. R. 1916=80 I. O. 22.



*Ghulam Rasul*—for Petitioner.

**Judgment.**—The District Magistrate's order under S. 476, Criminal P. C., directing the prosecution of the petitioner Maqbal Ahmad is open to several objections. In the first place, the Magistrate does not himself give any reason for holding that the complaint of the petitioner is false. Further, it appears that he did not record any evidence except the statement of the complainant, and proceeded entirely upon the result of the investigation made under S. 202, Criminal P. C., by Chaudri Niamat Khan, a Magistrate of the First Class. It is doubtful whether an investigation under S. 202, Criminal P. C., can be regarded as a judicial proceeding and may be used for supporting an order under S. 476; vide *Kachi Madar Labhai, In re* (1) and *Bapu v. Bapu* (2).

Mr. Ghulam Rasul also invites my attention to the fact that the complainant was not allowed to adduce the whole of his evidence in support of his complaint and it is clear that in a case of that kind exceptionally strong reasons are required to justify an order under S. 476; vide *Kachi Madar Labhai, In re* (1). It is also contended on the strength of the observations contained, in *Ali Muhammad v. Emperor* (3), that the District Magistrate, who was himself a Magistrate of the First Class, was not competent to direct another Magistrate of the First Class to make an investigation under S. 202, Criminal P. C., because the latter Magistrate was not subordinate to the former, and that the result of the investigation so made cannot be utilized for the purpose of ordering the prosecution of the petitioner. I need not pronounce any final opinion on the subject, because I am clear that the order complained of cannot be sustained. I accordingly accept the application for revision and quash the order under S. 476.

R.M./R.K. *Application accepted.*

(1) [1911] 10 I. C. 619.

(2) [1912] 39 Mad. 750=14 I. C. 305. (F. B.)

(3) [1911] 2 P. R. 1912 Cr.=12 I. C. 515.

## A. I. R. 1919 Lahore 38

PETMAN, J.

*Shah Jahan*—Appellant.

v.

*Inayat Shah and others*—Respondents.

Second Appeal No. 3112 of 1918, Decided on 17th May 1919.

(a) Civil P. C. (5 of 1908), S. 105—Interlocutory order—Right to attack propriety and correctness in appeal is not deprived.

The right conferred by S. 105, Civil P. C., is unqualified and by complying with the directions or findings of an intermediate order a plaintiff is not deprived of the right to raise in appeal the question of the propriety of such order and to attack its correctness. [P 39 C 1]

(b) Civil P. C. (5 of 1908), S. 105—Interlocutory order—Compliance with order under penalty of having suit dismissed—Appellant is not debarred from contesting in appeal—Compliance is not voluntary.

Plaintiff sued for possession by partition of definitely marked portions of certain premises, but was ordered to amend his plaint so as to include the whole of the premises under the penalty of having his suit dismissed. He amended his plaint accordingly. The first Court held that certain party were not liable to be partitioned. In appeal the plaintiff attacked the order directing amendment of the plaint. The District Judge held that by complying with the order the plaintiff had divested himself of the right to dispute any part of the premises being included in the property to be partitioned. The plaintiff thereupon filed a second appeal to the High Court:

*Held:* that the plaintiff's compliance not being a voluntary one, he could go behind the order directing amendment of the plaint and that the lower appellate Court erred in not considering and deciding whether this order was correct. [P 39 C 1]

*Fakir Chand*—for Appellant.

*Ram Lal for Dalip Singh*—for Respondents.

**Order.**—The plaintiff-appellant instituted a suit for one-fourth share by partition of certain portions of premises. In his original plaint his claim related to the parts marked A and B on the plan on the record. In an amended plaint his claim related to the parts marked A, B, C, D and E. Thereafter, on the ground that other parts of the premises were joint and that a claim could not be made in respect of a portion only, the plaintiff was ordered, by an order dated 30th April 1917 to amend his plaint so as to include the whole of the premises under the penalty, in the case of default of having his suit dismissed. The proper order would have been one of rejection and not dismissal. The plaintiff amended his plaint accordingly. It was no doubt, open to the plaintiff to elect not to amend further and to appeal from the rejection of his plaint.

One of the defendants, Inayat Shah, claimed the parts marked A and C as his exclusive property by virtue of his being the muttawali of the khankha adjoining A. The first Court held, inter alia, that the parts marked A and C were



wakf and not liable to be partitioned. The plaintiff appealed and in his third ground of appeal attacked the order of the first Court dated 30th April 1917. The lower appellate Court held that, by complying with the order of the first Court instead of letting his suit be dismissed and then appealing from the dismissal (which it held the proper course to be adopted) and by presenting the plaint in its final form, the plaintiff had divested himself of the right to dispute any part of the premises being included in the property to be partitioned.

No authority is given for this decision which appears to be incorrect. Under S. 588, Civil P. C., of 1882 an appeal was given from an order directing the amendment of a plaint, but this right was not maintained by the present Code which by S. 105 merely gives the right to attack such an order in the appeal from the decree in suit. The right conferred is unqualified and there is nothing to support the contention that by complying with the directions or findings of an intermediate order a plaintiff is deprived of the right to raise the question in appeal and to attack the correctness of the order. It appears to me that a plaintiff is not compelled to run the risk of losing the whole suit by allowing his plaint to be rejected, as he well might under the law of limitation. The result of failure on appeal might be disastrous. A compliance under the circumstances of this case cannot be regarded as a purely voluntary one. No authority has been quoted to me, nor apparently does any exist, that, under such circumstances, a plaintiff cannot go behind an order for amendment, whilst S. 105 of the Code apparently gives him the right to do so. I hold therefore that the lower appellate Court erred in not considering and deciding whether the order of the first Court dated 30th April 1917 was correct. The plaintiff appellant was entitled to have a decision of the lower appellate Court on the question whether the parts of the premises alleged by him to be his exclusive property were of that description and whether the order of the first Court directing an amendment of the plaint was correct.

Apart from S. 105 of the Code it would certainly be anomalous that, whereas a party has the right to appeal from a decree based on a finding of fact, he should

have no such right, except by allowing the Court to reject his plaint, and possibly run considerable risk where the finding of fact results not in a decree but merely in an intermediate or interlocutory order. In addition to the above I find that the lower appellate Court has fallen into substantial errors. In dealing with grounds 2 and 3 of the appeal together, it was under the erroneous idea that the plaintiff was contending that the parts of the premises marked A and C ought not to have been included in the property to be partitioned, and that the appellant was precluded from this contention by the order of the first Court dated 30th April 1917. As explained above, the plaintiff's claim prior to that order had been for the partition of these parts. He objected to the inclusion of entirely different parts which defendant 2 desired to include. Grounds 2 and 3 of the appeal related to distinct matters. Ground 2 challenged the finding of the first Court with regard to the parts of the premises held to be wakf. As to this the lower appellate Court remarks :

" Counsel for both sides addressed to me some eloquent arguments on the question whether part of the property is a khankah and wakf. I regret that I overlooked at the time the fact that this point was not mentioned in the grounds of appeal and so does not arise. However the contention that parts of the disputed area are wakf was only brought forward on the assumption that the decision of 30th April 1917 could now be set aside. As I hold that it cannot it is unnecessary for me to deal with the point. "

The above remarks show an entire misconception of the case of the appellant. It is clear that ground 2 of the appeal did raise the question whether the parts marked A and C were wakf and the order of the first Court of 30th April 1917 was not in respect of these parts but in respect of parts which the plaintiff had not included in his plaint. The plaintiff prayed for the partition of parts A and C, and this prayer had been refused by the first Court on the ground that those parts were wakf. The plaintiff-appellant was entitled to contest the finding of the first Court on this point.

For the reasons stated above I remand the case to the lower appellate Court and direct it to re-hear the appeal in respect of grounds 2 and 3 of the appeal instituted by the appellant in that Court in the light of the above remarks and to decide the matters raised thereby and to



return its findings to this Court by an early date.

R.M./R.K.

*Case remanded.*

### A. I. R. 1919 Lahore 40 (1)

MARTINEAU, J.

*Shiv Dev Singh*—Petitioner.

v.

*Jai Ram* and *another*—Opposite Parties.

Civil Revn. No. 670 of 1918, Decided on 28th February 1919, from order of Sub-Judge, First Class, Lahore, D/- 13th July 1918.

**Custom (Punjab) — Alienation — Father — Son has no interest in redemption—Suit to enforce mortgage—Son is not entitled to be impleaded—Civil P. C. (5 of 1908), O. 34, R. 1.**

Under Hindu law a son is co-parcener, an owner of the ancestral property along with his father and other members of the family. Under Customary law a son has no right of ownership in his father's lifetime. He has only a reversionary interest in the property and a right to protect that interest by interfering to prevent unnecessary alienations. This limited interest that he possesses is not such an interest as is contemplated by O. 34, R. 1. Therefore where a mortgagee brings a suit to enforce the mortgage, the mortgagor's son is not entitled to be made a party to the suit. [P 40 C 1]

*Sewa Ram Singh*—for Petitioner.

*Jai Gopal Sethi*—for Opposite Parties.

**Judgment.**—The plaintiff has brought a suit for the sale of property mortgaged by the defendant. The latter's son applies to this Court for revision of an order of the Subordinate Judge refusing to make him a party to the suit. O. 34, R. 1, Civil P. C., requires that all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage, and it is contended for the applicant that he has an interest in the mortgage security.

Rulings based on Hindu law are not in point, as the applicant is admittedly governed by custom. Under the Hindu law the son is a co-parcener, an owner of the ancestral property along with his father and other members of the joint family. Under the Customary law the son has no right of ownership in his father's lifetime. He has only a reversionary interest in the property, and a right to protect that interest by interfering to prevent unnecessary alienations. I do not think that the limited interest that he possesses is such an interest as is contemplated by O. 34, R. 1, and I hold

therefore that the applicant is not a necessary party in the suit.

I dismiss this application with costs.

R.M./R.K.

*Petition dismissed.*

### A. I. R. 1919 Lahore 40 (2)

DUNDAS, J.

*Mt. Indi* and *another*—Defendants—Appellants.

v.

*Ghania* and *another*—Plaintiff and Defendants—Respondents.

Second Appeal No. 481 of 1919, Decided on 11th June 1919, from decree of Dist. Judge, Hoshiarpur, D/- 4th January 1919.

**(a) Hindu Law — Guardianship — Minor daughter—Mother is natural guardian after father—Re-marriage recognized by custom—Right of guardianship is not lost.**

Under Hindu law the mother is, after the father, the natural legal guardian of her minor daughter and she does not lose her right by re-marriage in any case when such remarriage is recognized as valid by custom. [P 41 C 1]

**(b) Hindu Law — Guardianship — Minor daughter—Paternal grandfather cannot be appointed as guardian in presence of mother unless for minor's welfare.**

Unless it can be shown that the welfare of a female minor is being neglected by the mother, it is not permissible to appoint the paternal grandfather as guardian of the person of the minor and to allow him to remove the girl from the custody of the mother. [P 41 C 2]

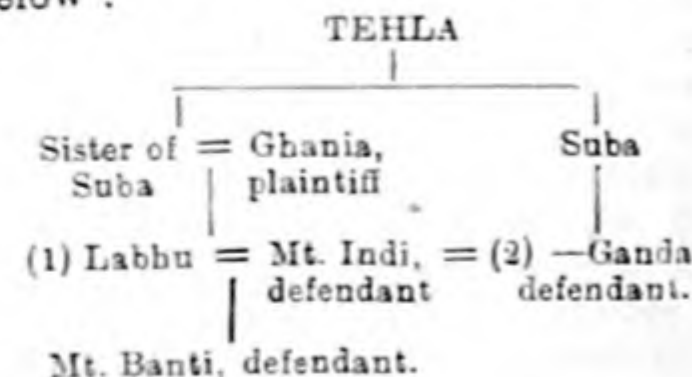
**(c) Hindu Law — Marriage — Mother has right to marry her daughter in presence of paternal grandfather.**

A Hindu mother can effect a valid marriage for her daughter even in the presence of the paternal grandfather. [P 41 C 1]

*Sewn Ram Singh*—for Appellants.

*H. D. Bhalla*—for Respondents.

**Judgment.**—The case will be the clearer by a reference to the genealogy below :



The parties are Hindu Jats of the Hoshiarpur District. The defendant, Mt. Indi, was first married to Labhu by whom she had a daughter, Mt. Banti. On Labhu's death some 13 years ago she remarried Ganda, taking her infant daughter with her, and the girl has lived with her mother in Ganda's house for 12 or 13 years. A suit has now been

brought by the girl's paternal grandfather Ghania, for a declaration that he has a prior right to Mt. Indi to give Mt. Banti in marriage; he has also applied to be appointed guardian of the person of Mt. Banti and has been successful in both proceedings, whilst Mt. Indi's appeal in the declaratory suit has been dismissed by the learned District Judge. Mt. Indi has again appealed to this Court both in the suit and in the guardianship proceedings. The parties are Hindu Jats and the decision should follow their custom if any definite custom can be ascertained, failing which it is permissible to fall back on their personal law.

Now there can be no doubt that under Hindu law the mother is, after the father, the natural and legal guardian of her minor daughter and she does not lose her right by remarriage in any case where such remarriage is recognized as valid by custom: Mayne's Hindu Law, Edn. 8, p. 276; Ram Krishna's Hindu Law, Vol. 2, pp. 406-407, *Nur Bibi v. Mehran* (1) and *Ganga Prasad v. Ramasrey* (2). This proposition is supported by much authority and is hardly open to question, whilst among Jats the custom of the remarriage of widows is certainly common and the validity of Mt. Indi's marriage to Ganda has not been denied. Unless therefore it can be shown that the welfare of the minor is being neglected by her mother, it certainly does not appear to be permissible to appoint the grandfather as guardian of the person of the minor and to allow him to remove the girl from the custody of her mother. The rule that the mother or a maternal grandmother has the better title to the guardianship of a girl has been followed in many published decisions, e. g., *Fatima v. Rani* (3), a case from Delhi, and *Ambo v. Ganga Sahai* (4) a Punjab case, where the maternal grandmother was preferred to the father's father and *Bindo v. Sam La!* (5) where the maternal grandmother was preferred to even the father. As there does not appear to be any reason to suppose that Mt. Indi is neglecting the welfare of her daughter, it follows that the order of the Senior Subordinate Judge appointing

Ghania as guardian of the person of Mt. Banti is not maintainable and must be set aside.

To turn to the question of the right of the grandfather to give the girl in marriage. In the judgment of the learned District Judge some expressions appear from which it might be inferred that before him the original preferential right of the grandfather to select a husband for the girl was admitted. Nevertheless the ground of appeal in the District Court goes so far as to deny the grandfather's right and in the grounds preferred to this Court it is not admitted: whilst in argument it is contended that in any case the grandfather has entirely neglected his granddaughter until the time when he thinks that he can derive some personal advantage from her disposal in marriage, that he is not interested in her welfare and has therefore forfeited his right, even supposing that any such right ever existed. The text on which the grandfather's claim might be based is given in Mayne (Edn. 8), p. 101:

"A father shall give his daughter in marriage himself or a brother with the father's consent or a grandfather, maternal uncle or relatives. In default of all these the mother, if she is qualified."

The view has however been taken in Madras that the object of placing the male relation before the mother was merely to supply the protection and advice which the Hindu system considered to be necessary on account of the dependent condition of women, which dependence has now practically ceased to be enforced by the law. In a recent decision the text has been discussed, and the conclusion arrived at that the mother is entitled to so decided a voice in the selection of the bridegroom that she can effect a valid marriage for her daughter even in the presence of the paternal grandfather, and even though it be not shown that he has neglected his duties: *Ranganaikammal v. Ramanuja Aiyangar* (6). In Bombay the view has been taken that the text refers to the ceremonial duties at the girl's marriage, which are laid upon the paternal relatives as a matter of duty and which are not ordinarily to be performed by a woman. In the selection of the bridegroom, which is a different matter, the mother must be consulted; and the text

(1) [1887] 44 P. R. 1887.

(2) [1911] 88 Cal. 862=10 I. C. 69.

(3) [1915] 28 I. C. 507.

(4) [1918] 18 I. C. 141.

(5) [1907] 29 All. 210.

(6) [1911] 85 Mad. 728=11 I. C. 570.



inculcates on the paternal relative a duty, but does not confer a right: *Bai Ramkore v. Jamnadas Mulchand* (7). In the Punjab it has been held that the mother alone can effect a valid marriage of her daughter [*Maya Devi v. Ram Chand* (8)] and in Bombay that a marriage so performed is not invalidated even by the absence of the father's consent: *Mulchand v. Bhudhia* (9). The authorities quoted above certainly do not lead to the conclusion that the text must be interpreted as conferring a right on the grandfather to dispose of the girl in marriage in opposition to the wishes of the mother, and although there is a judgment in the Punjab [*Narain Das v. Mt. Gurdevi* (10)] to the effect that the mother is not entitled to entirely disregard the wishes of her husband's collaterals, this was a limitation placed on the view expressed by the local commissioner that the mother has full authority.

It is at least difficult to see why a girl should be liable to be taken away from her natural guardian and disposed of by a possibly distant kinsman, and there does not appear to be any judicial authority for this view, at least none has been quoted. In the absence therefore of any great preponderance of evidence proving a custom to the contrary, the conclusion from judicial decisions would appear to be that the mother has a preferential right to select a bridegroom or at least that the grandfather cannot dispose of the girl in opposition to her wishes. From this it would follow that the grandfather is not entitled to the declaration sought, and taking this view I accept the appeal and dismiss the suit with costs throughout.

R M./R.K. *Appeal accepted.*

- (7) [1912] 37 Bom. 18=17 I. C. 95.  
 (8) [1915] 20 P. R. 1916=31 I. C. 184.  
 (9) [1898] 22 Bom. 812.  
 (10) [1884] 64 P. R. 1884.

## A. I. R. 1919 Lahore 42

PETMAN, J.

*Bhan Singh*—Defendant—Appellant.

v.

*Gokal Chand*—Plaintiff—Respondent.

Second Appeal No. 574 of 1919, Decided on 27th May 1919, from decree of Dist. Judge, Amritsar, D/- 4th December 1918.

(a) Limitation Act (9 of 1908), S. 5—Second appeal—Time spent in obtaining copy of first Court's judgment can be allowed

—Failure to file copy of decree makes appeal invalid—Cross-appeals—Matter in issue same—Dismissal of one appeal operates as res judicata—Mere error in weighing evidence is not sufficient ground for second appeal—Civil P. C. (5 of 1908), Ss. 11, 100 and O. 41, R. 1.

Plaintiff sued defendant for the recovery of Rs. 825 principal and Rs. 412-8-0 interest on a bahi entry alleging that the defendant owed him Rs. 725 on a previous bahi account that that bahi had been lost and that Rs. 100 had been advanced at the time of the defendants signing the entry sued on. The Rs. 725 were made up of three items, viz, Rs. 150, Rs. 310 and Rs. 225. The first Court holding that the items of Rs. 150 and 350 had not been proved gave plaintiff a decree for Rs. 325 with interest at 2 per cent per annum making a total of Rs. 448-8-0. Both parties appealed. The District judge wrote a judgment covering both appeals and dismissed the defendant's appeal and accepted that of the plaintiff allowing him Rs. 825 principal and Rs. 264 interest. Separate decrees were given in the two appeals. The defendant preferred a second appeal to the High Court and attached copies of the judgment of the 1st Court, the two judgments in appeal and the decree in the plaintiff's appeal but no copy of the decree in his own appeal:

*Held:* (1) that the appellant was entitled to an extension of the period of limitation to the extent of the time occupied in obtaining a copy of the 1st Court's judgment; [P 43, C 1]

(2) that inasmuch as no copy of the lower appellate Court decree in the defendant's appeal to that Court had been filed there was no valid appeal in the High Court from that decree; 85 P. R. 1905, Dist. [P 43 C 2]

(3) that on the general principles of the doctrine of res judicata the present appeal was barred in respect of Rs. 448-8-0, inasmuch as the sum was directly in issue in the defendant's appeal to the lower appellate Court; [P 44 C 1]

(4) that the findings as to the items of Rs. 150 and Rs. 350 were conclusive and a mere alleged error in weighing evidence was not a sufficient ground for second appeal. [P 44 C 1, 2]

(b) Evidence Act (1872), S. 92, Proviso 2—Entry in bahi—Evidence of oral agreement to pay interest is admissible.

Evidence relating to an oral agreement entered in a bahi to pay interest is admissible under the 2nd proviso to S. 92, Evidence Act, and the existence of such an agreement is a question of fact which cannot be considered in second appeal: 10 I. C. 315, Dist. [P 45 C 1]

*Kharak Singh*—for Appellant.

*Praduman Das*—for Respondent.

**Judgment.**—The facts necessary to be mentioned for the purposes of this second appeal are that the plaintiff-respondent instituted a suit against the defendant-appellant for the recovery of Rs. 825 principal and Rs. 412-8-0 interest on a bahi entry executed by the defendant. The plaintiff's case was that the defendant owed him Rs. 725 on a previous bahi account and that bahi had been lost while Rs. 100 had been



advanced to the defendant at the time of signing the entry of Rs. 825, now sued on. The Rs. 725 were made up of three items, namely, Rs. 150, Rs. 350 and Rs. 225. The first Court held that the plaintiff had failed to prove the items of Rs. 150 and Rs. 350, and gave him a decree for Rs. 325 with interest at 2 per cent per annum making a total of Rs. 448-8-0. Both parties appealed; the appeal of the defendant being No. 345 of 1918 and that of plaintiff 351 of 1918. The lower appellate Court wrote a judgment in Appeal No. 345 covering both appeals and thereby he dismissed the defendant's appeal No. 345 and accepted the plaintiffs' appeal No. 351 allowing the latter Rs. 825 principal and Rs. 264 interest or a total of Rs. 1,089. The usual brief judgment was also written in Appeal No. 351, wherein the plaintiff's appeal was accepted for the reasons given in Appeal No. 345. Separate decrees were given in the two appeals. To his grounds of second appeal in this Court the appellant attached copies of the judgment of the first Court, the two judgments in appeal and of the decree in Appeal No. 351, but no copy of the decree in Appeal No. 345.

For the plaintiff-respondent various preliminary objections are raised. The first is that the appeal is barred by time. In reply it is contended that the appeal is not barred if the time occupied in obtaining a copy of the first Court's judgment is allowed and it is prayed that this be allowed. Although at present the attaching of the copy of the first Court's judgment with the appeal is not a rule of Court it is a practice which is observed and insisted upon. The advantages of having a copy of the first Court's judgment attached to the appeal are so obvious that it is probable that the matter will be provided for in the rules. Under S. 5, Lim. Act, I allow an extension of the period of limitation as prayed for. The next preliminary objection is that there is no legal and valid appeal before this Court in respect of the decree passed in Appeal No. 345 in the lower appellate Court, because a copy of that decree does not accompany the grounds of this appeal and that therefore the decree in that appeal is final and the items covered by that decree are *res judicata* and cannot be dealt with now. Reliance is placed

(1) [1903] 22 P. R. 1903.

on O. 41, R. 1, Civil P. C. and a number of authorities including *C. v. C. & B.* (1). For the appellant it is contended in reply that it is not necessary that copies of both the appeals should accompany the grounds of appeal in a consolidated judgment and reliance is placed on *Jogal Kishore v. Chammo* (2).

It is clear that for the reasons urged by the respondent there is no valid appeal in this Court from the decree in Appeal No. 345 but that to my mind, does not conclude the matter. The decision in *Jogal Kishore v. Chammo* (2), relied on by the appellant is not on all fours with the present case. In that case two suits for pre-emption were instituted by two rival pre-emptors against the same defendant in respect of the same property. Both cases were tried together and disposed of by one judgment. One plaintiff was granted a decree giving her the right to pre-empt within a certain time and the other was granted a decree giving him the same right on the failure of the first. The head note is apparently wrong in stating that the same decree was given and that each pre-emptor was impleaded as a defendant in the suit of the other but that is not material for the present purpose. The latter plaintiff appealed only from the decree in his own suit and the lower appellate Court held that the existence of the other judgment and decree which had become final were a bar to the appeal and dismissed it. It was held by a Full Bench of the Chief Court of the Punjab, whilst admitting that the question was one of difficulty that it was not necessary to appeal from both the decrees. But that case is distinguishable. In the present case the two appeals in the lower appellate Court were distinct and related to different subject-matters. In Appeal No. 345 the defendant's claim was that the plaintiff was not entitled to the sum of Rs. 448-8-0 which had been allowed him by the first Court, and in Appeal No. 351 the plaintiff claimed that he was entitled to Rs. 500 and interest which the first Court had disallowed.

The law of *res judicata* in relation to two simultaneous decrees between the same parties is a difficult subject and the High Courts in India have not held the same views, and I may add that beyond merely referring me to the judgment in

(2) [1905] 85 P. R. 1905.



*Jogal Kishore v. Chammo* (2), no attempt has been made to argue the point involved and no authority has been cited dealing with circumstances similar to the present. It appears to me on the general principles of the law of res judicata that the present appeal in respect of Rs. 448-8-0 is barred. It would be convenient here to state that the decree in Appeal No. 351, a copy of which has been attached, is not merely for the further sum of Rs. 500 and interest claimed in that appeal but includes the sum of Rs. 448-8-0 which is the subject-matter of Appeal No. 345, and grants a decree for Rs. 1,089. It might be argued for the appellant that the present appeal arises out of the original suit for Rs. 825 and interest and that the question in issue between the parties in both the first and the lower appellate Courts was whether that money was due or not and that a decree having ultimately been passed against him for Rs. 1,089, he is entitled to raise all questions permitted in second appeal included in, or covered by that decree and that he is so entitled irrespective of the fact that there may be another simultaneous decree which purported to modify the decree of the first Court and dismissed his appeal No. 345. But in my opinion, the proper test is not the contents of a decree. We have to see what was the matter directly and substantially in issue in appeal No. 345, and the only matter there in issue related to the sum of Rs. 448-8-0. The decision was against the defendant-appellant and as I have already held that there is no valid appeal before this Court in respect of appeal No. 345, it follows that the decision is final and this appeal in respect of the Rs. 448-8-0 is barred as res judicata. The matter in issue in appeal No. 351 was different, and it can make no difference that both matters were dealt with by the same judgment, through as explained there are two judgments, and the decree in Appeal No. 351 included the Rs. 448-8-0.

The third preliminary objection is that no second appeal lies in respect of the items of Rs. 150 and Rs. 350, that mere alleged error in weighing evidence is insufficient and that the findings as to these items are one of fact. The appellant contends that there is no evidence whatever on the record in support of the findings, inasmuch as the statement of the

plaintiff relied on by the Court was not made as a witness but as a party and no opportunity was given to cross-examine him. The record does not bear out the contention. The plaintiff was examined after the issues were fixed on a day fixed for evidence, he was given the number 1 and the real witness was numbered 2. He was not cross-examined but that is immaterial. I hold no second appeal lies in respect of these items. There remains only the question raised by the appellant regarding the liability to pay interest. He contends that the bahi entry of Rs. 825 contains no reference to interest and that under S. 92, Evidence Act, the evidence of witnesses, who allege that it was settled at the time that interest was to be paid, is inadmissible, that there are no preceding transactions between the parties from which an agreement to pay interest can be implied, nor is there any direct evidence on the point and that the plaintiff has admitted that no interest was agreed to or fixed at the time of borrowing the Rs. 150 and Rs. 350. Reliance was placed on *Bura v. Mailia Shah* (3), *Raghu Mal v. Bandu* (4) and *Kishore Chand v. Gurditta Mal* (5). It is also urged that the circumstances were peculiar as the defendant was suspected of being a party to the destruction of the previous bahi and that the probabilities are that he was induced to sign a fresh account on the advance of another Rs. 100 and the promise that no interest would be charged and that otherwise there is no explanation of an omission to make any entry as to interest. The respondent contends that Rs. 123 out of the total amount of interest allowed is part of the Rs. 448-8-0 and cannot be gone into, and I hold that this contention is correct. He also contends that the item of Rs. 225 is admittedly made up of Rs. 220 principal and Rs. 25 interest, from which an implied agreement with regard to the payment of interest can be implied.

The question of interest has been somewhat perfunctorily dealt with by both the lower Courts. The finding of the first Court is not very clearly expressed, but what it apparently found was that the plaintiff had proved that at the time the entries relating to the Rs. 825 were made, there was an oral agreement bet-

(3) [1901] 104 P. R. 1901.

(4) [1908] 110 P. R. 1908.

(5) [1911] 52 P. R. 1911=10 I. C. 315.



ween the parties that interest was to be paid, but that the rate of interest had either not been agreed upon, or had not been proved. The lower appellate Court in effect accepts this finding and also holds that the rate of interest allowed is reasonable. The contention of the appellant that evidence regarding the oral agreement is inadmissible under S. 92, Evidence Act, is untenable. The judgment in *Kishore Chand v. Gurditta Mal* (5) relied on by him in support of his contention is inapplicable. The grounds of that decision are that the instruments sued on were shah jog hundis drawn with the utmost formality and could not be regarded but as documents of a very formal nature and that therefore the alleged oral agreement as to interest on which the hundis were silent, was not saved by Prov. 2, S. 92, Evidence Act. The concluding words of that proviso, which are very material, are as follows:

"In considering whether or not this proviso applies the Court shall have regard to the degree of formality of the document."

Entries in bahis cannot be said to bear any formal character and may be of various descriptions. I hold therefore that the evidence relating to an oral agreement to pay interest is admissible under Prov. 2, S. 92, Evidence Act and that the existence of such an agreement is a question of fact which cannot be considered in second appeal. For the above reasons I dismiss the appeal with costs throughout.

R.M./R.K.

*Appeal dismissed.*

### A. I. R. 1919 Lahore 45 (1)

MARTINEAU, J.

*Bishambar Nath*—Defendant—Appellant.

v.

*Mt. Parbati*—Plaintiff—Respondent.

Miso. First Appeal No. 2271 of 1918, Decided on 18th December 1918, from order of Dist. Judge, Delhi, D/- 26th July 1918.

Lunacy Act (1912), S. 75—Manager appointed for lunatic's estate—Court has no power to alienate property—Manager alone is competent.

Under Ch. 5, Lunacy Act, where a manager is appointed of a lunatic's estate it is he alone who can, with the permission of the Court, alienate any portion of it. The Court has no power to do so. [P 45 C 2]

*Gobind Das*—for Appellant.

*B. D. Kureshi*—for Respondent.

**Judgment.**—Jagdish Rai was adjudged to be of unsound mind, and Bishambar Nath was appointed manager of his estate. On an application made by Mt. Parbati, the guardian of the person of the lunatic, under S. 80, Act 4 of 1912, for the removal of the manager, and for the appointment of another person in his place for the purpose of selling the lunatic's house, the District Judge has passed an order for the house to be sold. Bishambar Nath appeals. There is no need to go into the question whether it is desirable or not that the house should be sold, or whether, as the learned District Judge finds, Bishambar Nath has been mismanaging the property of the lunatic, as the appeal must succeed on the ground that the learned District Judge had no power to order the house to be sold. Under Ch. 5, Act 4 of 1912, where a manager of the lunatic's estate has been appointed, the Court has no power to alienate any portion of it. It is only the manager who can do so, with the permission of the Court. If the appellant is mismanaging the estate and is not a fit person to remain in charge of it the Court may, under S. 80 (1) of the Act, remove him and appoint some one else in his place. This is in fact what the respondent asked the Court to do, but instead of passing an order under S. 80 the lower Court has ordered the sale of the property, which it was not competent to do. I cannot agree with the contention of counsel for the respondent that the order should be regarded as one for the removal of the manager. Although the objection that the order is illegal was not taken in the grounds of appeal, it is one which cannot be ignored. Holding that the lower Court's order was ultra vires I accept the appeal and set aside the order. This will not debar the District Judge from taking action under S. 80, if he finds that there is sufficient cause for doing so. The parties will bear their own costs.

R.M./R.K.

*Appeal accepted.*

### A. I. R. 1919 Lahore 45 (2)

RATTIGAN, C. J.

*Labhu Ram*—Defendant—Appellant.

v.

*Puran Chand*—Plaintiff—Respondent.

Second Appeal No. 2562 of 1918, Decided on 14th March 1919, from order of Dist. Judge, Ludhiana, D/- 19th June 1918.



**Provincial Insolvency Act (1907), S. 37**—Payment made by debtor of his own accord and without any sort of pressure is fraudulent preference—Payment to creditor on eve of bankruptcy—Presumption is of preference—Burden of proof is on creditor.

An insolvency Court is justified in holding that a payment to a creditor made by a person, who at the time of such payment is unable to pay his debts, must be taken as a payment with a view to prefer that creditor, if it is established that the payment is made of the debtor's own accord not in the ordinary course of business, and without any sort of pressure being brought to bear upon him. [P 47 C 1]

In any event if a man on the eve of bankruptcy makes a payment to a particular creditor, the presumption immediately arises that he makes that payment with the dominant view of giving a preference to that creditor over his other creditors. The fact that the debtor was insolvent when he made the payment, and knew that he was insolvent, causes the onus of proof to shift, and it is for the creditor to whom the payment has been made to show that the payment was not made with a view to prefer him. [P 47 C 1, 2]

*Amin Chand*—for Appellant.

*Jaggan Nath*—for Respondent.

**Judgment.**—The question which I have to decide is whether a payment of Rs. 500 made to the appellant Labbu Ram on 11th December 1916 by Umrao Singh was "a payment by a person unable to pay his debts" in favour of a creditor with a view of giving that creditor a preference over other creditors, and as such void and fraudulent within the meaning of S. 37, Provincial Insolvency Act of 1907? The payment was (as stated) made on 11th December 1916 and on 17th January 1917 Rai Sahib Lala Murli Dhar, a creditor, presented an application under S. 6 of the Act for the adjudication of Umrao Singh as an insolvent. The payment was thus made within three months of the date on which the petition was presented, and on 28th May 1917, Umrao Singh was adjudged an insolvent upon the said petition. It is abundantly clear from the evidence on the record that Umrao Singh was in very straitened and embarrassed circumstances for some considerable time prior to December 1916 and unable to pay his creditors in full. It is also established that he owes a very large sum of money to numerous creditors. In these circumstances the receiver appointed by the Court has applied for the avoidance of the payment to Labbu Ram and prays that the latter should be ordered to refund the money paid to him to the receiver. This application is made under S. 37 of the Act, and the District Judge has held that the payment

amounted to a clear case of fraudulent preference, and he accordingly directed Labbu Ram to refund the sum of Rs. 500 to the receiver for pro rata distribution among all the creditors including himself. From this order Labbu Ram has appealed to this Court and I have heard arguments at length by counsel on his behalf and on behalf of the respondent receiver. The law upon the question before me is stated as follows in Halsbury's Laws of England, Vol. 2, para. 471 :

"In order that a transaction may be set aside as a fraudulent preference, it is necessary to prove that it was carried out with the substantial or dominant view of giving the creditor a preference over the other creditors. This need not be the primary result aimed at. It is sufficient that it should be the object aimed at in bringing about that primary result. If the transaction can properly be referred to some other motive than that of giving the creditor paid a preference over the other creditors, the payment is not fraudulent and void, for it is from the intention on the part of the debtor to act in fraud of the law, that is to prevent the distribution of the bankrupt's property rateably among all his creditors, that the invalidity of the transaction arises.

"In ascertaining whether the giving of preference, that is, putting the creditor in a better position relatively to the other creditors than that in which he would be placed by the bankruptcy law, was the dominant view in the debtor's mind, the proper test to be applied is: Was the act done voluntarily? A question, the solution of which depends primarily on the inquiry: From which party did the proposition originate? A voluntary disposition is an act moving from the debtor; a voluntary payment is a payment simply by the act and will of the party making it; if there is anything to interfere with or control this will, then it is not a voluntary payment. The question always is: Did the thing move from the debtor or from the creditor? If it moves entirely from the debtor in the sense that it was his spontaneous act, uninfluenced by any circumstances which tend to rebut the presumption that the bankrupt made a distinction among his creditors, then the transaction will be held to be a fraudulent preference. On the other hand, if the proposal for the



payment or disposition of the property comes entirely from the creditor and is not collusive, the transaction will stand.

"That the transaction was not the spontaneous act of the debtor can best be established by proving that it was the result of pressure brought to bear on the debtor, either by a creditor in the ordinary sense or by a surety. The pressure must be real; the debtor must have been under some genuine apprehension; it must have been operative on his mind, and the dominant influence affecting it: the transaction must have been entered into by reason of it, and it must not have been fraudulent.

"In every case the state of mind of the debtor is the paramount consideration. The intention or view to prefer the creditor as the *causa causans* of the debtor's conduct is the cardinal point round which the whole question turns; if that intention be shown not to have existed, it is of no importance that the creditor had knowledge of the debtor's insolvency or that the debt was not due; nor for this purpose is it true that the debtor must be taken to have intended the natural consequences of his act."

Speaking generally, I think the authorities support the view that the words "with a view of giving such creditor a preference over the other creditors" bear the same meaning that the word "voluntarily" was construed to have in the old Bankruptcy Act in England, see as to this Mellish, L. J., in *Bolland, Ex parte, Cherry, In re* (1), and that a Court is justified in holding that the payment to a creditor made by a person, who at the time of such payment is unable to pay his debts, must be taken as a payment with a view to prefer that creditor, if it is established that the payment is made of the debtor's own accord, not in the ordinary course of business, and without any sort of pressure being brought to bear upon him. And in any event, as observed by Vaughan Williams, L. J., in *Lake, In re, Dyer, Ex parte* (2):

"If a man on the eve of bankruptcy makes a payment to a particular creditor, the presumption immediately arises that he makes that payment with the dominant view of giving a preference to that creditor over his other creditors."

The same learned Lord Justice re-

(1) [1871] 7 Ch. Ap. 24.

(2) [1901] 1 K. B. 710.

marked in another case: *Eaton & Co., In re, Viney, Ex parte* (3) that: "the fact that the debtors were insolvent when they made the payment, and knew that they were insolvent, causes the onus of proof to shift, and it is for the respondent to show that the payment was not made with a view to prefer him."

The law on the subject being as stated above, the question arises whether in the present case the payment to Labbu Ram was fraudulent and void within the meaning of S. 37 of the Act. As I have already pointed out, Umrao Singh was at the time hopelessly bankrupt, and according to Labbu Ram himself the payment was made by Umrao Singh of his own accord and without any sort of pressure being put upon him. In these circumstances it was for Labbu Ram to prove that the payment did not fall within the purview of S. 37 of the Act, and this, I must hold, he has failed to establish. I accordingly dismiss this appeal with costs.

R.M./R.K. *Appeal dismissed.*

(3) [1897] 2 Q. B. 16.

### A. I. R. 1919 Lahore 47

RATTIGAN, C. J. AND MARTINEAU, J.

*Mt. Durga Devi* — Plaintiff — Appellant.

v.

*Ram Nath and others* — Defendants — Respondents.

First Appeal No. 2521 of 1914, Decided on 22nd January 1919, from decree of Dist. Judge, Jullundur, D/- 30th July 1914.

Limitation Act (1908), Arts. 49 and 62 — Art. 62 applies to every case where defendant at time of receipt, in fact or by presumption of law receives money to plaintiff's use — It is not confined to case when defendant intended to receive money to such use — Suit to recover documents taken possession of, and money realized by defendant held to be barred under Arts. 62 and 49.

A N carried on business in money-lending and as a commission agent. He died on 3rd December 1906, leaving a widow, the present plaintiff. Upon A N's death his father B R carried on the business as the plaintiff's agent till his death in February 1908, when R N, the brother of A N, took possession of the shop, all the bahis and account books, documents and a mortgage deed. He realized certain sums of money due to the business, but refused to pay the amounts to the plaintiff and to give up the bahis and other documents. She, accordingly on 2nd November 1912, brought the present suit: (a) to recover the money realized by the defendant, (b) for an injunction prohibiting him from realizing in future any debts due to A N and (c) for restoration of the bahis and other documents. The District Judge, being of opi-



nion that the suit in respect of (a) was barred by time under Art. 62, and in respect of (c) under Art. 49, dismissed the suit. The plaintiff appealed and did not press her claim for an injunction:

*Held:* that the reliefs sought were rightly held by the District Judge to be barred under Arts. 62 and 49, Sch. 1, Lim. Act. Art. 62 applies to every case where a defendant at the time of receipt, in fact or by presumption or fiction of law, receives money to the plaintiff's use, and is not confined to cases where the defendant intended to receive the money to such use, and as in this case, the plaintiff had alleged that she was in law solely entitled to the money, the defendant must undoubtedly have received the money for her use, and therefore the Article applied to bar her claim.

[P 48 C 2, P 49 C 1]

*Sheo Narain and Gokal Chand Narang*—for Appellant.

*Rambhaj Datta and Brij Lal*—for Respondents.

**Judgment.**—The late Rai Bahadur Pandit Bhag Ram, C. I. E., had two sons: (1) Mehta Fateh Chand, defendant in this case, and (2) Pandit Amar Nath, who died on 3rd December 1906, leaving a widow, Mt. Durga Devi, the present plaintiff. The suit was instituted on 2nd November 1912 and according to the allegations in the amended plaint (p. 82 et seq of the paper-book), which was filed on 6th February 1913, Pandit Amar Nath at the time of his death was sole proprietor of a shop in Jullundur city, which was started in Sambat 1958 and did business in money lending, dealings in silk, etc., and as a commission agency. Upon the death of Pandit Amar Nath, Rai Bahadur Pandit Bhag Ram carried on the business of the shop as plaintiff's agent till his death in February 1908, when defendant took possession of the shop and all the bahis and account-books and thereafter realized a large amount of debts from the debtors of the firm, including four specified debts of the total value of Rs. 660; he also realized and misappropriated a sum of about Rs. 500 due upon certain shares of the value of Rs. 5,000 purchased by the late Pandit Amar Nath in the Rajputana Printing Company; and further he took possession of certain documents, including a mortgage deed for Rs. 9,000, dated 12th February 1907, executed in the name of Rai Bahadur Pandit Bhag Ram, but in reality belonging to the estate of Pandit Amar Nath. The plaint asserts that defendant had no right to any of the abovementioned properties as he was separate from his brother the

late Pandit Amar Nath, and that though called upon several times by the plaintiff to pay the amounts realized by him and to give up the bahis, documents and the mortgage deed, he "put off the matter by giving evasive answers and still refuses" to comply with plaintiff's demand. The cause of action is alleged to have occurred about two and half years before suit, but the plaint does not explain how the cause of action arose at that time or give any details upon the point.

The reliefs sought by plaintiff were: (a) recovery of the Rs. 660 realized by defendant from the four specified debtors and the Rs. 500 realized by defendant in respect of the shares in the Rajputana Printing Company; (b) an injunction prohibiting defendant from realizing in the future any debts due to the shop of Pandit Amar Nath; and (c) restoration of the bahis, account books, documents and the mortgage deed for Rs. 9,000. Defendant urged a number of pleas, both on the merits and on technical grounds, in bar of the suit and upon the pleadings the District Judge framed 12 issues. The learned Judge has held that the suit is barred by time under Art. 62 (as regards item (a) of the claim) and under Art. 49 (as regards recovery of the books, documents, mortgage deed, etc.) of the Limitation Act, 1908; that the claim for an injunction (item (b) of the claim) is within time; and that the suit is also barred by the provisions of O. 2, R. Civil P. C. He has accordingly dismissed the suit though upon all the other issues (which he has decided *ex majori cautela*) his findings are in plaintiff's favour. Plaintiff has appealed to this Court, and we have heard Mr. Sheo Narain's arguments on her behalf. The learned advocate informed us at the outset that as Fateh Chand had died *pendente lite* and was now represented by a minor son under the guardianship of his mother, the claim for an injunction was no longer pressed by plaintiff.

Upon the view we take of the case, it is not necessary for us to discuss any question other than that of limitation, as we agree with the learned District Judge that the reliefs sought are respectively barred under Arts. 62 and 49, Lim. Act. As regards realizations of debts and of dividends upon the shares in the Rajputana Printing Company, Mr. Sheo Narain argues that Art. 120



and not Art. 62 is applicable to the claim inasmuch as there was no contractual relationship between the plaintiff and the defendant, and the defendant admittedly did not in fact receive those moneys for the plaintiff's use. In support of his argument the learned advocate relied on *Chand Mal v. Sansar Chand* (1) and *Joti Prasad v. Sant Lal* (2), but it appears to us that those decisions, so far from supporting the appellant's argument, are rather in favour of the view taken by the District Judge. It is a well-established principle that Art. 62 applies to every case where defendant, at the time of receipt, in fact or by presumption or fiction of law, receives money to plaintiff's use; and it has been repeatedly held that the article is not confined to cases where defendant intended to receive the money to such use but that it extends to all cases where a defendant has received money which in justice and equity belongs to plaintiff under circumstances which in law render a receipt of it a receipt by defendant to plaintiff's use. The authorities in support of these propositions will be found in Rustomji's Law of Limitation, Edn. 2, under Art. 62. In accordance with these authorities we must hold that upon the allegations in the plaint the defendant undoubtedly must be taken to have received the moneys for the use of plaintiff, inasmuch as according to her allegations she was in law solely entitled thereto. We accordingly agree with the District Judge that this claim is barred under the said article.

As regards the claim to recover bahis, documents and the mortgage deed, Mr. Sheo Narain himself contended that Art. 49 of the Act was applicable. In the plaint the allegation is that defendant took possession of the shop and of books, etc., therein at the time of Rai Bahadur Pandit Bhag Ram's death which occurred in 1908. The learned advocate admitted that plaintiff was unable to prove that she had made a demand for the recovery of the bahis, etc., at any particular time prior to suit and we must take it therefore that the books, etc., were wrongfully taken at the time when defendant took possession of the shop or, in other words in 1908.

(1) [1912] 86 P. R. 1913=17 I. C. 311.

(2) A. I. R. 1914 Lah. 161=21 I. C. 919=34 P. R. 1914.

Under Art. 49 therefore this claim which was not preferred till 1912, is clearly barred. For the reasons given we hold that the suit as a whole is barred by limitation and was rightly dismissed. The appeal is dismissed with costs.

R.M./R.K.

*Appeal dismissed.*

### A. I. R. 1919 Lahore 49

WILBERFORCE AND MARTINEAU, JJ.

*Manohar Lal*—Plaintiff—Appellant.

v.

*Nanak Chand*—Defendant—Respondent.

First Appeal No. 577 of 1916, Decided on 19th November 1918, from order of Senior Sub-Judge, Lahore, D/- 23rd December 1915.

Civil P. C. (1908), S. 11—Might and ought—Partition effected by arbitrators—Subsequent suit for partition of joint property besides that dealt with by arbitrators—Award does not operate as *res judicata*—Admission in arbitration proceedings being gratuitous do not create estoppel—Omission to give evidence does not prove waiver of right—Evidence Act (1 of 1872), S. 115.

Plaintiff instituted the present suit for partition of certain joint property and for possession of certain other property as exclusively his. In 1909 a partition of some joint property of the parties was made by arbitrators appointed by them, and the plaintiff now alleged that there was other joint property, besides that dealt with by the arbitrators, which the defendant did not disclose, and the present suit related to this property. The defendant denied that the suit property was joint, and pleaded that the arbitrators' award, and the decree thereon, estopped the plaintiff from now alleging that any property other than that included in the award, was joint, that the plaintiff had admitted at the time of the arbitration that the suit property was the exclusive property of the defendant, and that he had abandoned his rights in respect of the other property claimed by him. The trial Court, without recording a finding whether the property alleged to be joint was joint, dismissed this portion of the suit on the ground that the plaintiff not having included the property now alleged to be joint in the claim of 1909, he was debarred from suing for it now, the matter being *res judicata*. The plaintiff appealed:

*Held:* (1) that as the arbitrators neither gave any adjudication nor made any inquiry about the existence of joint property other than that mentioned in the agreement to refer to arbitration, and were told nothing about the property now in suit, their award did not operate as *res judicata* so as to bar the claim for partition of this property: (2) that it was for the defendant to prove that the plaintiff had waived his rights, and waiver was not to be inferred from plaintiff's omission to give evidence and explain when and how he came to know that the property was joint: (3) that in the absence of proof that plaintiff knew at the time of the arbitration that the property was joint, his admission would not



amount to waiver; the admission being gratuitous could be withdrawn, and did not create an estoppel as it did not lead to any change in defendant's position. [P 50 C 2, P 51 C 1]

*Muhammad Shafi, Abdul Rashid and Mehr Chand*—for Appellant.

*Sheo Narain and Tirath Ram*—for Respondent.

**Judgment.**—The plaintiff is the defendant's son, but was adopted by Bhai Nand Gopal, who was a brother of the defendant's mother. It has been found by the lower Court, and the correctness of the finding has not been contested before us, that the defendant lived with Nand Gopal and managed his property and that he continued managing it after Nand Gopal's death, which occurred in 1895. In 1909 a partition of some joint property of the parties was made by arbitrators appointed by them. The plaintiff alleges that besides that property there was other joint property, specified in para. 8 of the plaint, which the defendant did not disclose. He sues for its partition, and also for possession of certain property, moveable and immovable, mentioned in para. 9 of the plaint, which he claims as exclusively his, and of 3 kanals 16 marlas of land at Kila Gujar Singh, mentioned in para. 10, which he says is part of some land that was allotted to him at the partition in 1909. The lower Court has dismissed the suit in regard to the property specified in paras. 8, 9 (c) and (d) and 10 of the plaint, and passed a decree only for that mentioned in para. 9 (a) and (b). Both parties have appealed. With regard to the claim for partition of the property specified in para. 8 of the plaint the defendant denied that this property was joint, and pleaded that the arbitrators' award in 1909 and the decree passed thereon estopped the plaintiff from alleging that any property other than that which was included in the award was joint, that the plaintiff had admitted, at the time of the partition that the property now claimed as joint was the defendant's exclusive property, and that he had abandoned his rights in respect of the property mentioned in Cl. (a), para. 8.

The lower Court, without giving a finding as to whether the property mentioned in para. 8 is joint, has dismissed this portion of the claim on the ground that the plaintiff, not having included the pro-

perty alleged to be joint in the claim which he made in 1909, is debarred from suing for it now, the matter being res judicata. The learned Subordinate Judge is of opinion that the arbitrators were appointed in 1909 to partition the whole of the joint property, and not merely the specific property mentioned in the award. This is against the evidence of Mian Jamiat Singh, one of the arbitrators, who appears to be a disinterested witness and says that they were appointed only for the purpose of partitioning the property mentioned in the award, and that they had not to inquire whether there was other joint property. The agreement of 13th June 1909, by which the parties referred the matter to arbitration, did not recite that the whole of the joint property was to be partitioned, while in the award given on the following day it was stated by the arbitrators in the preamble that they had been appointed to divide the joint property "given below." In any case it is clear that the arbitrators neither gave any adjudication nor made any inquiry about the existence of other joint property, and they were told nothing about the property mentioned in para. 8 of the plaint, so that we cannot agree with the lower Court that the award of 1909 operates as res judicata so as to bar the claim for partition of this property. Mr. Sheo Narain on behalf of the respondent has in fact not tried to support the lower Court's finding on this point, but has argued that the plaintiff accepted the partition in 1909 as a partition of the whole of the joint property, that he did not wish to quarrel with his father, and considered some of the property to be not worth fighting for, and that so he dropped his claim to a share in the property specified in para. 8 of the plaint. In other words, it is argued that the plaintiff is estopped from suing for partition of this property by having waived his rights.

In the lower Court, however, waiver was not pleaded, except in regard to the property mentioned in Cl. (a), para. 8 of the plaint, and the contention now put forward is not supported by evidence. The statement of Mian Jamiat Singh, the principal witness as to the partition in 1909, does not show that the plaintiff gave up his rights in any of the property. Mr. Sheo Narain lays stress on the fact that the plaintiff has not gone into the



witness-box to explain when and how he came to know that the property was joint. But it was for the defendant to prove that the plaintiff had waived his rights, and waiver is not to be inferred from the plaintiff's omission to give evidence. Some documents have been referred to as proof of admissions on the plaintiff's part. Only two relate to property included in para. 8 of the plaint, namely: (1) a notice, Ex. D-15, dated 8th September 1911, from the plaintiff's pleader to the defendant (p. 212 of the printed record); and (2) a receipt, Ex. D. 21, dated 21st August 1910, executed by the plaintiff (p. 217 of the record).

In these the houses mentioned in Cls. (a) and (d), respectively, of para. 8 of the plaint are spoken of as the property of the defendant. Now, in the first place, assuming that the houses in question were joint property, it has not been proved that the plaintiff knew them to be joint when the admissions were made, and in the absence of proof of such knowledge there could be no waiver. He might well have believed that the defendant, who was managing the property and receiving the rent, was the sole owner. In the second place, the admissions referred to above were gratuitous admissions which could be withdrawn: see *Muhammad Imam Ali Khan v. Husain Khan* (1) and they do not create an estoppel as they did not lead to any change in the defendant's position. We find no evidence to prove that the plaintiff waived his rights in the property or is estopped from suing for partition. It becomes necessary therefore to determine the issues relating to the alleged joint property which the lower Court has left undisposed of. Before dealing with the claim to the remainder of the property in suit we remand the case to the lower Court, under O. 41, R. 25, Civil P. C., for findings to be given on issues 8 and 10 to 14.

R.M./R.K.

*Case remanded.*

(1) [1899] 26 Cal. 81=25 I. A. 161 (P. C.).

**A. I. R. 1919 Lahore 51**

ABDUL RAOOF, J.,

*Waryam Singh*—Plaintiff—Appellant.

v.

*Basant Singh and others*—Defendants—Respondents.

Second Appeal No. 2637 of 1917, Decided on 25th February 1919.

(a) Registration Act (1908), Ss. 17 and 49—S. 17 must be strictly construed.

Section 17 must be strictly construed, as taken in connexion with S. 49 of the Act, it imposes serious disqualifications for non-observance of registration. Unless a document is clearly brought within the purview of the section, it should not be excluded from being treated as evidence.

[P 53 C 2]

(b) Registration Act (1908), Ss. 2 (7), 17 and 49—Agreement permitting person to occupy land is not lease, nor "undertaking to occupy" in S. 2 (7)—Agreement requires no registration.

A mere undertaking to occupy land contained in a document will not make the document compulsorily registrable, unless some interest or right in the thing let is created by the document.

[P 53 C 1]

Defendant's father obtained possession of a piece of land under a written agreement from the plaintiff for the purpose of building a house on it, on the condition that the plaintiff would have no power to dispossess him during his life, but that on his death, in case of a disagreement between his heirs and the plaintiff the latter would have a right to eject them on paying them the price of the materials:

*Held:* that the agreement was not a lease in any sense, nor was it an undertaking to occupy within the meaning of S. 2 (7), Registration Act, and that inasmuch as it created no interest in the land, it did not require registration under S. 17 (d), Registration Act.

[P 53 C 2]

*Sleem and Dalip Singh*—for Appellant.

*Kanwar Narain*—for Respondents.

**Judgment.**—This second appeal arises out of a suit for the possession of a piece of land on the following allegations: Defendants' father Sundar Singh obtained it from the plaintiff for the purpose of building a house on it, on the condition that the plaintiff would have no power to dispossess him during his life, but on his death in case of a disagreement between his heirs and the plaintiff, the latter would have a right to eject them on paying them the price of the materials. It was further agreed that in case of a dispute as to the value of the materials the heirs would be at liberty to remove them and vacate the land. The terms of the agreement were reduced to writing and the present dispute relates to the nature and the terms of this deed of agreement. Sundar Singh having died, a disagreement arose between the parties which has given rise to this suit. This document embodying the terms of the agreement was put in evidence and was relied upon by the plaintiff. On the pleas raised in defence one of the issues framed by the Court of first instance was whether the document was admissible in evidence. The document was executed by



Sundar Singh, in which he set forth conditions on which he had agreed to build on the land. It was contended by the defendants that the document came under the definition of a lease and required registration under S. 17 (d), Registration Act. The learned Munsif of Jullundur held that it was merely an agreement and did not amount to a lease, and having decided the remaining issues also against the defendants, he gave the plaintiff a decree for the possession of the land in dispute. The defendants were ordered to remove the materials within two months. In the alternative they were given the right to take the price of the materials which was assessed by the Court at Rs. 537-4-6, and give up the house. They were not satisfied with the decision of the Court and preferred an appeal to the lower appellate Court and raised the following contentions:

That the agreement was not executed by their father, that the deed required registration, as (a) it was a lease for more than a year, and (b) dealt with property worth more than Rs. 100 in value; the plaint did not disclose a cause of action; that the agreement was indefinite as regards its terms, and the price of the materials had been under-estimated. On the question of the admissibility of the document the lower appellate Court took a different view from that taken by the Court of first instance and held that it required registration and was inadmissible for want of registration. In its opinion the document contained "an undertaking to occupy" the land and as such came under the description of a lease as given in S. 2 (7), Registration Act. The basis of the plaintiff's claim having failed, his suit was dismissed and certain cross-objections which he had filed were also dismissed. The plaintiff has come up in second appeal to this Court and three pleas have been raised in the memorandum of appeal on his behalf, namely, that the District Judge was wrong in holding that the agreement was inadmissible for want of registration, that the document was in any event admissible to prove the permissive possession of the defendants and the terms of such possession and that the plaintiff in any case was entitled to the value of the site.

It has been contended on behalf of the plaintiff that the very terms of the do-

cument show that it was merely a license granted to the father of the defendants to build on the land and remain in occupation during his life and that no interest in land was created by the document in his favour. I have examined the terms of the document carefully and I find that there is force in this contention. To start with, on the face of the deed there is no rent reserved nor is there any other consideration agreed upon. The very words of the deed go to show that Sundar Singh obtained permission to keep his house on the land during his life only. He acquired no right of any kind in the land itself. Had it been so there would have been no need of providing about the right of his heirs after his death. They would simply have come in as his representatives and would have been bound by the terms of the deed. The condition as to the price of the materials or as to their removal clearly shows that the parties understood that it was merely a license granted to Sundar Singh for his personal benefit during his lifetime. The following is the exact translation of the agreement:

"I, Sundar Singh, son of Gurdit Singh, cast Tarkhan, resident of Mauza Manak Rai, Thana Bhagpur, do hereby declare as follows:

"I have taken a vacant site (taur) in the abadi of Manak Rai, bounded on the east by a passage, i. e., a lane and a vacant site belonging to Thal Singh, on the west by the haveli of the sons of Nihal Singh, on the south by a passage to the haveli of Fateh Singh and on the north by a wall of the kotha belonging to Thakar Singh, son of Ram Singh, owned and possessed by Waryam Singh, son of Sant Singh, caste Jat, resident of Mauza Manik Rai for the purpose of habitation. I agree that I will construct a building in the said vacant site at my own expense. The proprietor shall have nothing to do with the costs incurred thereon. I will remain abad in it during my lifetime. The proprietor or his heirs shall not at all be competent to eject me during my lifetime. After my death, if the proprietor or his heirs fall out with my heirs, they shall pay the costs of the materials and effect ejectment. In case a dispute takes place in respect of the cost of the materials, my heirs shall remove the materials and make over the vacant site to the proprietor or his heirs. Hence I have executed this deed of agreement, so that it may serve as an authority. Dated 27th June 1900, corresponding to 14th Har Sambat 1957."

Reading the deed according to its plain terms, it is apparent that at least Sundar Singh never contemplated that he was taking a lease of the land. It was argued in the lower appellate Court and it is argued also before me that the deed contains merely a unilateral statement



by Sundar Singh and its terms are so uncertain that it cannot be treated as a lease. The case of *Beni v. Puran Das* (1) is relied upon before me as it was also in the lower appellate Court. But it is not necessary for me to enter into the discussion whether the decision in that case was correct or incorrect, because I am clearly of opinion in the present case that the agreement can in no sense be said to be a lease. It is contended however by the counsel for the respondent that if the document according to its terms cannot strictly be said to be a lease it must be taken to be "an undertaking to occupy" and as such to require registration. The real question however to decide is: Was the undertaking to occupy the site as a lessee or as a mere licensee? In this case there was "an undertaking to occupy" on certain conditions, but not as a lessee as no right or interest in the land was created. I agree in the construction put on the expression by the learned Judges of the Bombay High Court in *Apu Budgavda v. Narhari Annajee* (2). The facts of that case, no doubt, were different, but it was decided in that case that a mere undertaking to occupy contained in a document would not make the document compulsorily registrable unless some interest or right in the thing let was created. In that case such right or interest was not created as the terms had not been accepted. In the present case no interest or right has been created, as it has not been shown that it was ever intended by the owner to create such an interest or right. The decision in *Athakutti v. Govinda* (3) shows that a mere permission to occupy land on certain terms did not create a lease. It was held that it was not a case of a tenant but the case of a licensee.

It has been held in this Court that S. 17, Registration Act, should be construed very strictly as read with S. 49; it imposes a serious disability [see the judgment of Rivaz, J., in *Imam Bakhsh Khan v. Karim Shah* (4)]. This opinion was adopted by the learned Judges who decided the case of *Sansar Singh v. Tiloka* (5). They made the following remark

at p. 175 of *P. R.* 1898, which fully applies to the facts of the present case:

"Further as observed by the same learned Judge at p. 63 of the report, S. 17, Registration Act, has to be strictly construed as taken in connexion with S. 49; it imposes such serious disqualifications for non-observance of registration. Unless the document is clearly brought within the purview of the section, it cannot be excluded from being treated as evidence. If there is doubt, the benefit must be given to it."

Applying this principle this case, I must hold that the lower appellate Court was not right in setting aside the judgment and decree of the Court of first instance on the ground that the document relied upon was inadmissible in evidence. I allow the appeal, set aside the decision of the Court below on this preliminary point and remand the case to that Court under O. 41, R. 23, to be restored to its original number of pending appeals and to be disposed of according to law.

R.M./R.K.

Appeal allowed.

### A. I. R. 1919 Lahore 53

WILBERFORCE AND MARTINEAU, JJ.

*Manohar Lal*—Plaintiff—Appellant.

v.

*Nanak Chand*—Defendant — Respondent.

First Appeal No. 971 of 1914, Decided on 31st November 1918, from order of Dist. Judge, Lahore, D/- 22nd January 1914.

Civil P. C. (1908), S. 33—Failure to prepare decree—Appellant is not deprived of his right of appeal—Civil P. C., S. 96.

Although under S. 33, it is imperative that a decree should follow the judgment and it is the duty of the Court to have one drawn up, yet an omission or neglect by the Court in the performance of the duties in this respect cannot deprive an appellant of his right of appeal.

[P 54 C 1]

*Muhammad Shafi, Abdul Rashid and Mehr Chand*—for Appellant.

*Sheo Narain and Tirath Ram* — for Respondent.

**Judgment.**—In this case the plaintiff sued the defendant in respect of four different properties. The District Judge held that four distinct causes of action had been combined in one suit, that they should be separately stamped and valued and that in respect of the claim under appeal, permission for its combination with the other causes of action should be refused. The plaintiff accordingly has instituted a separate suit regarding the other causes of action and the objection regarding misjoinder in the present case

(1) [1905] 27 All. 190.

(2) [1879-79] 8 Bom. 21.

(3) [1893] 16 Mad. 97.

(4) [1895] 16 P. R. 1895.

(5) [1898] 51 P. R. 1898.



has disappeared. In the same case the District Judge also held that the claim must fail on account of the want of the sanction of the Collector under S. 92, Civil P. C., and dismissed the suit with costs with liberty to bring a fresh suit, but no decree was drawn up. It is against the latter part of the District Judge's judgment that an appeal has been preferred.

A preliminary objection has been raised by the respondent that no appeal lies merely against the judgment and that O. 41, R. 1, requiring the memorandum of appeal to be accompanied by a copy of the decree has not been complied with. Further, counsel for the respondent argues that even if a decree should have been drawn up it was the duty of the appellant to move the Court for this purpose. Against this counsel for the appellant argues that, under S. 33, Civil P. C., it is imperative that a decree shall follow the judgment and that it is the duty of the Court to comply with the provisions of the law. We agree that a decree should have followed the judgment and that it was the duty of the Court to have had it drawn up, and we do not think that such an omission or neglect of its duties can deprive the appellant of his right of appeal. We therefore overrule this objection and allow the appellant to apply to the lower Court within one month for the drawing up of a formal decree, to be attached to the memorandum of appeal as soon as it is obtained.

We think however the appellant somewhat to blame in preferring this appeal without a copy of the decree, and for this hearing grant costs to the respondent.

R.M./R.K. *Order accordingly.*

### A. I. R. 1919 Lahore 54

WILBERFORCE, J.

*Budhu and another* — Defendants — Appellants.

v.

*Barkat Ram and others*—Plaintiff and Defendants—Respondents.

Misc. Second Appeal No. 1202 of 1919, Decided on 23rd December 1919, from order of Dist. Judge, Sialkot, D/-9th May 1919.

Civil P. C. (1908), S. 64 — House subject to mortgage attached in execution — Attachment set aside but on same day house re-attached — Before re-attachment, however judgment-debtor selling equity of redemption to mortgagee — Decree-holders appealing against order setting aside attachment —

First attachment ordered to stand—Decree-holder privately purchasing equity of redemption and admitting full satisfaction of decree — He thereafter suing for possession of house by redemption of mortgage—Decree-holder's rights were not affected by temporary discontinuance of attachment—Decree-holder however forfeited his rights by becoming private purchaser and so was not entitled to any benefit under S. 64—Change effected by S. 64 of new Code did not make any difference—Civil P. C. (1859), S. 240.

The decree-holder attached in execution a house of the judgment-debtor which was already mortgaged. Objection to the attachment was made by judgment-debtor and the attachment was set aside and on the same day the house was again re-attached. Before the re-attachment the judgment-debtor also sold his remaining rights to the mortgagees. Decree-holder appealed against the order setting aside the attachment and the appellate Court ordered the first attachment to stand. The decree-holder then privately purchased the equity of redemption from the judgment-debtor and admitted full satisfaction of the decree. He then sued the mortgagee for possession of the house by redemption.

*Held*: that the decree-holder's rights were not affected by the temporary discontinuance of the attachment.

*Held further*: that the decree-holder forfeited his rights by becoming private purchaser, and having no longer any claim enforceable under the attachment could not obtain any benefit from the provisions of S. 64. The change effected in S. 64 of the new Code did not make any difference because that change merely affected the legality of a transfer as against claims enforceable under an attachment: 31 *All.* 367; 23 *Cal.* 829 and 80 *P. R.* 1903, *Rel. on*; 14 *C. L. J.* 476, *Ref.*; 7 *Cal.* 107 (*P. C.*), *Appl.* [P 56 C 1]

*Manohar Lal and Gullu Ram* — for Appellants.

*Tirath Ram*—for Respondent.

**Wilberforce, J.** —In this case the plaintiff on a decree obtained against the defendant got his house attached on 27th May 1917. The house had already been mortgaged to the present appellants. An objection was made by the judgment-debtor against the attachment and the Munsif in an extraordinary judgment set aside the existing attachment on 30th June 1917 and on the same day ordered its re-attachment. This took place on the following day. On that day also the judgment-debtor sold his remaining rights to the mortgagees the present appellants. Subsequently the decree-holder appealed against the order of the Munsif setting aside the original attachment of 27th May and the District Judge accepted the appeal and ordered the first attachment to stand. It is not clear whether the sale to the mortgagees on 1st July took place prior to the re-attachment. This how-



ever has been assumed by both the Courts to be the case. No fraud moreover of the mortgagees purchasers was alleged or established although the District Judge held that the sale to them on 1st July was highly suspicious. This was obviously the case. But on the facts as found no fraud has been proved. The plaintiff after his successful appeal privately purchased the equity of redemption on 18th January 1918 from the judgment-debtor and put in a receipt admitting full satisfaction of the decree. The attachment was then withdrawn.

In the present suit the decree-holder on the basis of his private purchase has asked for possession of the house by redemption from the mortgagees and his suit has been contested by them on the ground that they hold it by a valid sale deed in their favour. The first Court dismissed the suit on the ground that the plaintiff was entitled to no priority having privately purchased the property and not obtained it by sale in execution. The lower appellate Court has accepted an appeal against this decision on the grounds that the attachment was still in force when the mortgagees purchased it and that the plaintiff had in no way prejudiced his rights by purchasing it privately from the judgment-debtor. Against this decision the defendant mortgagees have preferred a second appeal. Mr. Manohar Lal on their behalf has urged that a revival of execution proceedings does not operate as a revival of attachment so as to prejudice the rights of strangers who have in the interval acquired a title to the property. In support of this contention he refers first to R. 57, O. 21, Civil P. C., which provides that upon a dismissal of the application for execution the attachment shall cease. He also cites *Patringa Koer v. Madhavanand Ram* (1), as an authority in support of this view. He next relies on *Divendranath Sannial v. Ram Kumar Ghose* (2) as an authority that a private sale to the plaintiff did not pass any interest to him as he derived his title through the vendor and could not acquire a better title than the vendees. The learned District Judge considered this judgment but held that as it was based on S. 240 of the Code of 1859 it was of little authority under the present Code.

Counsel for the respondents cites various authorities in his favour and relies especially on *Ali Ahmad Khan v. Bansi Dhar* (3), which holds that the lien of an attaching creditor over the property attached dates from the attachment and is not destroyed or affected by an order of release which was in effect set aside by a subsequent suit. The same is the opinion of the Judges in *Bonomali Rai v. Prosunno Narain Choudhuri* (4). Counsel also refers to *Hakim Singh v. Charan Das* (5) in which a Full Bench of this Court held that dealings effected during the appealable period even though notice of an appeal has not been received are governed by the law of *lis pendens* and do not affect the right of an appellant. He urges and in my opinion correctly that the same principles apply in execution cases. The learned Judges in that case referred to the remarks of the Calcutta High Court that the law of *lis pendens* in this country is founded on the fact that it would be impossible to bring any suit to a successful termination if alienations *pendente lite* were permitted to prevail. It was in flagrant disregard of such a principle that the judgment-debtor in this case directly after the decision of the Munsif releasing the house from attachment and ordering its re-attachment sold it to the defendant.

While I therefore agree with the learned District Judge that the decree-holder's rights were not affected by the temporary discontinuance of the attachment I am unable to uphold his opinion that the Privy Council judgment reported in *Khodabux v. Badree Narain Singh* (6) is no longer a good authority on the ground that S. 240 of the Code of 1859 differs substantially from S. 64 of the Code of 1908. The sections in question are as follows:

"After any attachment shall have been made by actual seizure, or by written order as aforesaid, and in the case of attachment by written order after it shall have been duly intimated and made known in manner aforesaid any private alienation of the property attached whether by sale gift or otherwise. . . shall be null and void (S. 240). For the purposes of this case it is only necessary to notice that in S. 64 of the new Code the concluding sentence runs "shall be void as against all claims enforceable under the attachment."

(3) [1904] 31 All. 367.

(4) [1896] 23 Cal. 829.

(5) [1903] 80 P. R. 1903.

(6) [1881] 7 Cal. 137.

(1) [1911] 14 O. L. J. 476.

(2) [1881] 7 Cal. 107 (P. C.).



This addition appears to me to be directly due to the decision of their Lordships of the Privy Council in *Dinendronath Sunnial v. Ram Kumar Ghose* (2). In that case in spite of the fact that there was no mention in S. 240 of the voidability of a transfer only as against all claims enforceable under the attachment the decree-holder's rights were held to be strictly limited to such claims. With the law altered as it is there can appear no doubt that if a decree-holder forfeited his rights under the old law by becoming a private purchaser, he does the same under the present law, which merely affects the legality of a transfer as against claims enforceable under an attachment. I agree therefore with the Munsif that the decree-holder in this case not having secured his title from the Court and having no longer any claim enforceable under the attachment cannot obtain any benefit from the provisions of S. 64. I therefore accept the appeal and dismiss plaintiff's suit. Parties can bear their own costs throughout in view of the circumstances of the case.

R.M./R.K.

*Appeal accepted.***A. I. R. 1919 Lahore 56**

BROADWAY AND ABDUL RAOOF, JJ.

*Saligram and another* — Plaintiffs—Appellants.

v.

*Bassao Mal and another*—Defendants and Plaintiffs—Respondents.

Second Appeal No. 2100 of 1915, Decided on 8th May 1919, against decree of Dist. Judge, Jullundur, D/- 17th April 1915.

**Civil P. C. (1903), S. 92—Hindu temple—Worshipper can, without sanction under S. 92, sue for declaration that certain property is trust property attached to temple.**

A Hindu entitled to worship in a temple is not competent as such to maintain a suit for possession of property alleged to belong to the temple, as prima facie it is only the trustees who can claim that relief. But he can sue for a declaration that a certain property is trust property attached to the temple and no sanction is necessary under S. 92, Civil P. C., to bring such a suit. [P 57 C 1]

*Nanak Chand*—for Appellants.*Tek Chand*—for Respondents.

**Judgment.**—The facts of the suit out of which this appeal has arisen are briefly as follows: On 12th October 1907 one Charan Das, chela of Gobind Das, asadh bairagi of Nakodar, sold a certain house

to Bassao Mal. On 13th October 1913 Mul Raj, Salig Ram and Raja Ram, sons of Badhawa, Brahmans of Nakodar, instituted this suit against Bassao Mal and Charan Das in which they asked for a decree for possession of the "open space" in suit after removal of the materials thereon or in the alternative for a decree to the effect that the said "open space" together with the materials thereon was the property and in possession of certain temple, and that the possession of the said property should be made over to the said temple after the sale in question had been set aside. As to the first prayer, it was claimed that the plaintiffs' ancestors had made this particular property in suit dharmarth to provide for the expenses of the temple in Bhailian Street and [that therefore the property being dharmarth Charan Das, the man in charge, was not entitled to sell it. The Courts below have held that the property in suit was not at any time the property of the plaintiffs' ancestors and had not been dedicated for religious purpose by them. This question has not been reopened and need not be further considered. As to the prayer in the alternative, the primary Court having decided the case on the first point gave no finding. The learned District Judge however came to the conclusion that before the plaintiffs could institute the suit, assuming the property to pertain to a religious institution, it was necessary for them to obtain the necessary sanction laid down by S. 92, Civil P. C. Against this decision the plaintiffs have preferred this second appeal through Mr. Nanak Chand, and we have heard Bakshi Tek Chand on behalf of the respondents.

Our attention has been drawn to the fact that the learned District Judge has confused two houses. One house is the house in which there is a gurdwara, and the other house is the one in suit. A reference to the judgment of the learned District Judge at p. 9, lines 1 to 7 of the print book, indicates that there had been some confusion as alleged. The muafi referred to was not granted in connexion with the house in suit but in connexion with the house in which there is a gurdwara, and this house is not in suit. In face of this confusion the finding of the learned District Judge at line 1, p. 9 of the printed book, that the property having descended from guru to chela is



therefore religious in character is one that requires reconsideration. With regard to the applicability of S. 92, Civil P. C., Mr. Tekchand admitted that if the claim was merely confined to a declaration that the property in suit was dhar-marh and therefore not alienable, the plaintiffs could sue without recourse to S. 92. He however contended that, inasmuch as possession of the temple was also asked for this further prayer brought the suit within the purview of S. 92, Civil P. C. Mr. Nanak Chand however contended that this further prayer was a mere surplusage and might and should be regarded as such. Now, it seems to us that the plaintiffs could not, as worshippers, sue for possession, as prima facie it is only the trustee who could claim that relief. The plaintiffs however can sue for a declaration and to such a suit S. 92 has no application. We hold therefore that no sanction was necessary under S. 92 for a suit for a declaration and as the learned District Judge has confused the two properties we consider, that there should be a rehearing of the appeal before him. We accordingly accept this appeal and return the case to the Court below who will re-hear the appeal so far as the claim for a declaration is concerned and come to a definite finding thereon. Costs in this Court will follow the event.

R.M./R.K.

*Case remanded.***A. I. R. 1919 Lahore 57**

SCOTT-SMITH AND MARTINEAU, JJ.

*Emperor*

v.

*Multan Singh—Accused.*

Criminal Ref. No. 49 of 1919, Decided on 8th May 1919, made by Sess. Judge, Ambala, D/- 10th January 1919.

(a) Criminal P. C. (1898), S. 89—S. 89 offers no facility for contesting legality of proclamation.

Section 89 prescribes a remedy where there is a good and legal publication, but offers no facility for the contesting of the legality of the proclamation.

Consequently a person cannot contest the legality of the proclamation in his application under S. 89. But there is nothing to prevent the High Court from considering it in exercise of its revisional jurisdiction: 22 All. 216, *Foll.*; 19 Mad. 3, *Rel. on.* [P 59 C 1]

(b) Criminal P. C. (1898), S. 87 (3)—Order stating that proclamation duly published, but not stating that it was published on specified

day—It is not conclusive evidence that S. 87 is complied with.

Order under S. 87 (3), to the effect that the proclamation was duly published, but not stating that it was published on a specified day cannot be considered conclusive evidence that the requirements of S. 87 have been complied with. [P 59 C 2]

(c) Criminal P. C. (1898), S. 87 (2) (a) and (c)—Requirements of publication not complied with—Proclamation taking place within less than 30 days from date fixed for appearance—Proclamation is illegal and subsequent proceedings invalid.

Where the requirements as to publication contained in S. 87 (2) (a) and (c) are not complied with and the publication takes place on a day which is less than thirty days from the date fixed for the appearance of the petitioner, the publication of the proclamation is not in accordance with law, and the subsequent proceedings are therefore also invalid. [P 59 C 2]

(d) Criminal P. C. (1898), S. 89—District Magistrate rejecting application for restoration of property attached under S. 89—Appeal lies to Sessions Court under Criminal P. C. (1898), S. 405.

An appeal from the District Magistrate's order rejecting application for restoration of the property attached, under S. 89, was competent to the Court of the Sessions Judge under S. 405. [P 59 C 1]

*Shamair Chand* for G. C. Narang—for Accused.

**Facts.**—On 20th March 1917 a complaint (dated 15th March 1917) was presented to the Subdivisional Officer, Rupar, who recorded the complainant's statement and sent the proceedings to an Honorary Magistrate of Kharar for disposal. On 23rd March 1917 the Honorary Magistrate issued summons under S. 498, I. P. C., to Multan Singh and others. On 30th March 1917, the complainant applied to the Honorary Magistrate to the effect that Multan Singh had gone with the woman concerned in the case to some other place (i.e., was keeping out of the way) and a bailable warrant issued for 10th April 1917. (It is important here to note that Multan Singh before the District Magistrate filed an identity certificate, with a view to showing that on 9th April 1917 he appeared, under his alleged second name "Gharib," before the Calcutta Police, the photograph on that certificate is unquestionably that of Multan Singh.) A fresh warrant was issued by the Honorary Magistrate for 19th April 1917; and on that date it was noted on the record that the warrant had not been returned; and a date was fixed, 8th May 1917.

On 8th May 1917 it was noted that the appellant could not be found; and the Honorary Magistrate ordered a pro-



clamation to issue under S. 87, Criminal P. C., fixing 11th June 1917 for hearing (i.e., more than the 30 days required under S. 87). It is here important to note that on 11th June 1917 the appellant did not appear; and the Honorary Magistrate then passed a validating order to the effect that publication of the proclamation had taken place as required by law under S. 87 and the Tahsildar was directed to prepare a list of attachable property. On 7th July 1917 the Court ordered certain property to be attached and a report was received in September 1917. Meanwhile certain objections had been raised by one Laiq Ram (that the property was ancestral) and by Multan Singh's wife and mother (that certain property should be released for their maintenance). These objections failed before the Honorary Magistrate on 24th November 1917, before the Sessions Judge on 19th December 1917, and before the Chief Court on 19th April 1918.

The property of the accused was attached and seized by Khan Bahadur Sayad Basir Hussain, Honorary Magistrate, exercising the powers of a Magistrate of the First Class in the Ambala District, by order dated 7th July 1917, under S. 88, Criminal P. C., and an application to the District Magistrate asking him for the return of the sale price of his moveable property and for the release from attachment of certain land attached by that Court and still under attachment was rejected on 23rd September 1918.

**Grounds.**—I am unable to agree entirely with the District Magistrate's view expressed in para. 2 of his order of 23rd September 1918, now under appeal, for though S. 88, Civil P. C., empowers the Court issuing the proclamation to attach "at any time," it seems to me quite clear that the proclamation under S. 87 was really a nullity and for the following reasons: S. 87 (2) prescribes the mode of publication a, b, c. In respect of the proclamation in question there is nothing whatever to show that it was publicly read anywhere; and though it was affixed to appellant Multan Singh's ordinary place of residence on 15th May 1917 no duplicate was affixed to a "conspicuous part of the court-house." A duplicate was apparently affixed to the door of the police station. The provisions of S. 87 (2) (a) (b) and (c) are mandatory and consequently it seems quite clear

that the proclamation was really a nullity. However there comes this difficulty S. 87 (3)—since we find that on 11th June 1917, the Honorary Magistrate did actually pass a validating order—which must be accepted as "conclusive evidence" that the requirements of S. 87 have been complied with.

This certainly seems an extraordinary provision of law; but there can be no doubt of its existence. I have been unable to find Punjab authority on the point; but I have seen *Queen-Empress v. Subbarayar* (1), *Mian Jan v. Abdul* (2) and *Abdullah v. Jitu* (3). In the first of these reported cases it was found that the proclamation was affixed to the court-house on 6th November 1893, requiring a person to appear on 11th December 1893, but was not published in the village until 15th November 1893, and it was held that there was no legal proclamation under S. 87, and the order was set aside and the attachment declared void. In the second ruling it was held that the proclamation was "an absolute necessity," but then there had apparently been no validating order under S. 87 (3), Criminal P. C. However the ruling to which I wish to draw special attention is in *Abdullah v. Jitu* (3), (at p. 218, the last 10 lines—and 219 middle, beginning at "It has been objected"). According to my view, though the proclamation in the present case was nullity, Multan Singh cannot now take exception to it, because of the Honorary Magistrate's validating order. Multan Singh however has certain rights under S. 89, Criminal P. C.; and I think it is clear that evidence to prove that appellant was absconding as well as his evidence in exculpation must be heard in his presence and a judicial determination on the point must be come to.

The District Magistrate does not appear to have heard any evidence. Multan Singh has wished to prove (a) that on 9th April 1917, he was in Calcutta; (b) that his second name is "Gharib;" (c) that he was not absconding, and that he went to Penang. And his counsel produced before me three registered envelopes in proof of his client's visit to Penang. Whatever the truth of the matter may be, it seems to me clear that Multan

(1) [1896] 19 Mad. 3.

(2) [1905] 27 All. 572.

(3) [1900] 22 All. 216



Singh must have an opportunity of proving his assertions. I cannot myself direct further inquiry into this matter under S. 437, Criminal P. C., and I accordingly forward this report under S. 438, Criminal P. C., for the orders of the Chief Court of the Punjab. Since the above order was written, appellant's counsel has applied verbally to this Court, putting forward that, since this is an appeal, this Court could itself take action under S. 428, Criminal P. C. However, apart from the fact that this is asking this Court to review its own order, and also, that it seems desirable to obtain (if possible) the Chief Court's view of the correct interpretation of S. 87 (3), Criminal P. C., I doubt if S. 428, Criminal P. C., can apply here. That section distinctly refers to the taking of additional evidence whereas, in the present case, it does not appear that any evidence was taken at all by the District Magistrate. My order of 16th December 1918 will therefore stand.

### Order.

**Scott-Smith, J.**—The facts of this case are given in the referring order of the Sessions Judge, Ambala, dated 16th December 1918. The District Magistrate having passed an order rejecting the petitioner's application for restoration of the property attached under S. 89, Criminal P. C., an appeal was filed in the Court of the Sessions Judge, and such an appeal was competent under S. 405, Criminal P. C. At the same time we agree with the dictum of Blair, J., in *Abdullah v. Jitu* (3), at p. 219 :

"that S. 89 prescribes a remedy where there is a good and legal publication, but offers no facility for the contesting of the legality of the proclamation."

The petitioner therefore could not, contest the legality of the proclamation in his application under S. 89, Criminal P. C., but there is nothing to prevent this Court from considering it in exercise of its revisional jurisdiction as was done in the case reported as *Queen-Empress v. Subbarayar* (1). The learned Sessions Judge is of opinion that the legality of the proclamation proceeding cannot be questioned having regard to the fact that the Magistrate who held those proceedings recorded an order under S. 87 (3), Criminal P. C., to the effect that the proclamation had been duly published. It is contended before us that this

validating order is defective. S. 87 (3) runs as follows :

"A statement in writing by the Court issuing the proclamation to the effect that the proclamation was duly published on a specified day shall be conclusive evidence that the requirements of this section have been complied with, and that the proclamation was published on such day."

Now, in the so-called validating order the Magistrate stated as follows: "*Aj yeh misl pesh hui, report ishtihar zer dafa' 87 zabita Faujdari ba'd ta'mil hasb zabita shamil misl ho chuki hai.*" This may be taken to mean that the proclamation under S. 87 has been duly published; but it is nowhere stated that the proclamation was duly published on a specified day. The words "on a specified day" are important, because S. 78 (1) lays down that the proclamation must require the person against whom a warrant has been issued to appear at a specified place and at a specified time not less than thirty days from the date of publishing such proclamation. It is therefore clear to us that the so-called validating order is defective, and the statement in writing by the Court referred to above cannot, under the circumstances, be considered conclusive evidence that the requirements of S. 87 have been complied with.

Now, turning to the proclamation proceedings we find that, as stated by the learned Sessions Judge, the requirements as to publication contained in S. 82 (7)(a) and (c) were not complied with. Moreover, such publication as there was took place on 15th May which was less than thirty days from 11th June, the date fixed for the appearance of the petitioner. It is therefore clear that the publication of the proclamation was not in accordance with law, and the subsequent proceedings are therefore also invalid. In *Queen-Empress v. Subbarayar* (3) it was held that there was no legal proclamation under S. 87, Criminal P. C., and the High Court set the order of attachment aside. We therefore accept the revision and setting aside the attachments of the petitioner's property as invalid direct that so much of the property, moveable or immovable, as has not yet been sold be restored to him and that the proceeds of the sale of any property which has taken place be refunded to him.

R.M./R.K.

*Petition accepted.*



**A. I. R. 1919 Lahore 60**

BROADWAY AND ABDUL RAOOF, JJ.

*Ramdas*—Plaintiff—Appellant.

v.

*Nadir Shah and others*—Defendants—Respondents.

Second Appeal No. 2780 of 1915, Decided on 12th May 1919, from a decree of Dist. Judge, Lyallpore, D/- 6th May 1915.

(a) Registration Act (1908), S. 17 — Document providing for division of property to be purchased in future does not require registration.

An agreement between certain persons, providing the manner in which certain property should be divided between them in the event of their succeeding in purchasing the same, does not require registration: 89 P.R. 1908; and 145 P.W.R. 1908, *Foll.* [P 62 C 1]

(b) Registration Act (1908), S. 17 (1) (b) — Right, title and interest must be present and not future.

The words "in future" in S. 17 (1) (b) relate to the preceding infinitives and not to the succeeding nouns, and therefore a right, title or interest whether vested or contingent must be a present and not a future right, title or interest. (1908) 89 P.R. 1908, and (1895) 16 P.R. 1895 *Foll.* [P 62 C 1]

(c) Registration Act (1908), S. 17 (1) (b) — Document reciting previous contract and that certain future right would accrue under certain circumstances, does not require registration.

A document reciting that a certain contract had already been entered into and that in the event of certain happenings a certain future right would accrue does not fall within the purview of S. 17 (1) (b) and does not require registration. [P 62 C 1]

(d) Registration Act (1908), Ss. 17 (1) (b), and 49 — S. 17 (1) (b) read with S. 49 must be very strictly construed — Benefit of doubt should be given in favour of document, not compulsorily registrable.

Section 17 (1) (b) of the Act read with S. 49 must be very strictly construed, imposing as it does such grave disqualifications for non-observance of registration and the benefit of any doubt should be given in favour of the document not being compulsorily registrable. [P 62 C 1]

*Jai Gopal Sethi*—for Appellant.

*Metha Bahadur Chand* and *Moti Sagar* for *Mul Chand*—for Respondents.

**Judgment.**—The facts of this case out of which this appeal has arisen are contained in the judgments of the Courts below and need only be briefly recapitulated here. In 1896 one Ahmad Shah, a Tahsildar, acquired two ahatas in Lyallpur, Nos. 2858 and 2899. These were acquired from Government and No. 2858 was entered in the papers in the name of Ahmad Shah, while No. 2899 was entered in the name of Bahadur Shah, a minor

son of Ahmad Shah. Ahmad Shah died in 1901 and while No. 2858 was entered in the names of his three sons—Nadir Shah, Dilawar Shah and Bahadur Shah, No. 2896 continued to be entered in the name of Bahadur Shah. Dilawar Shah separated himself from his two brothers and released all claims to the Lyallpur property. With him we have no further concern.

On 21st July 1902 Nadir Shah executed a mortgage in the name of himself and his minor brother Bahadur Shah in favour of Ram Das. This mortgage related to certain property in Lahore and Ahata No. 2858, and the sum raised under this mortgage was Rs. 1,000. On 12th October 1902 Nadir Shah executed another mortgage in favour of the same Ram Das creating a further charge of Rs. 200 on Ahata No. 2858 and affecting certain Lahore property and Ahata No. 2899. This second mortgage was also executed by Nadir Shah on behalf of himself and his minor brother Bahadur Shah. On 22nd May 1905, Ahata No. 2899 was sold by Bahadur Shah to Khunshi Muhammad for Rs. 1,500, and on 23rd May 1905 Ahata No. 2858 was sold by the brothers to Amir Chand for Rs. 2,500. Subsequent to these two sales Pandit Mul Chand, pleader of Peshawar, appeared on the scene and approached Khunshi Muhammad and Amir Chand asserting that under an arrangement entered into between him and the deceased Ahmad Shah he was entitled to an interest in the two Ahatas Nos. 2858 and 2899. The date of this arrangement was said to have been the 15th May 1897. Khunshi Muhammad and Amir Chand then came to an arrangement by which these two Ahatas were partitioned. Lala Mul Chand then came to an arrangement by which these two Ahatas were partitioned, Lala Mul Chand being given No. 2899 and Khunshi Muhammad and Amir Chand jointly retaining between themselves No. 2858. This partition was duly entered in a registered deed, dated 21st September 1905. Ram Das, mortgagee, having realised Rs. 600 from the property mortgaged to him in Lahore instituted this suit for Rs. 2,604 impleading the original mortgagors, Khunshi Muhammad and Pandit Mul Chand. He entered into a settlement with Khunshi Muhammad and Amir Chand, receiving from them Rs. 250 and relinquishing his claim against Ahata



No. 2858. He however claimed that the balance of the money was recoverable from Ahata No. 2899. The primary Court held that Ahata No. 2899 could not be held liable and granted a decree against Nadir Shah and Bahadur Shah personally for Rs. 2,356. Against this decree Ram Das preferred an appeal to the District Judge claiming that Ahata No. 2899 was liable for the amount of the decree. This appeal having been dismissed Ram Das has now come up to this Court in second appeal through Mr. Jai Gopal Sethi and we have heard Mr. Moti Sagar on behalf of Pandit Mul Chand. It may be stated at the outset that the appellant does not now claim that the whole of the decretal amount should be declared as a charge on Ahata No. 2899 inasmuch as this Ahata was not included in the first mortgage.

The amount now in question is admittedly Rs. 558. The point for determination is whether the document, dated 15th May 1897, between Ahmad Shah and Mul Chand is admissible in evidence, for this document is on an eight annas stamp and is unregistered. On behalf of the appellant it has been urged that inasmuch as the agreement between Ahmad Shah and Mul Chand had been reduced to writing this writing alone cannot be treated as evidence of the transaction and that inasmuch as it clearly related to immovable property exceeding in value Rs. 100, it required registration and as registration had not been effected, the agreement could not be proved. Mr. Moti Sagar on the other hand contended that the agreement itself created no right, vested or contingent, in immovable property, but that it amounted to a record of an agreement that had already been entered into between the parties and that therefore such document was not compulsorily registrable under S. 17 of the Registration Act. Mr. Sethi contended that in all transactions negotiation preceded the final arrangement arrived at, and that if that arrangement was reduced to writing as evidence of it, then it was that document alone which could be referred to and that the preceding negotiations could not be proved. In support he referred us to *Buta Singh v. Gurdit Singh* (1) which itself referred to *Gurmukh Singh v. Pahlo* (2). There can be no doubt that

an oral bargain or a bargain entered into by means of correspondence necessarily precedes every contract. The document relating to that contract may be drawn up either with the intention of reciting an already completed contract or with that of superseding the oral bargain and formally evidencing the terms of the contract. Whether or not a particular document is intended to recite an already completed contract or to supersede the former bargain and formally evidence the terms of such contract is a question that must clearly be decided on the terms of such document itself and therefore, it is necessary to examine the document in this particular case. The agreement of 15th of May 1897 is as follows:

*Manke Syed Ahmad Shah Tahsildar ikrar karta hun ke mainne Lala Mul Chand Sahib, Wakil, Peshawar ke sathh waida kiya hua hai ke jis kadar dukanat wa makanat ki ijazat Sarkar se mile us kadar ka nisf unka aur nisf mera hoga aur sewai uske ke jo peshgi rupiya maine dukanat ka Sarkar men dakhil kiya hua hai, bakia rupia Sarkari our niz jis kadar lagat dukanat ki hogi sabh Lala Mul Chand apni girahse kharch karega aur main uska hisab bamujab asal kharch ke samjh lunga aur jab main chahunga nisf ka rupiya ada karke nisf apna lunga. Is waqt sabh kharch Lala Mul Chand ka hoga aur koi aur dawa unka na hoga.*

It will be seen that this document may be divided into two distinct parts. The first part appears to us clearly to recite the fact that a definite agreement had already been entered into, namely that Ahmad Shah had already agreed that Mul Chand was to take the half of such shops or houses as Ahmad Shah might acquire from Government. The second portion lays down that Mulchand is to pay the balance of any sums due to Government and to comply with the conditions imposed by Government and to erect the necessary structures at his own expense. Ahmad Shah was entitled to be informed what the total expenditure by Mulchand came to, and whenever he chose to pay a half of such expenditure he would be entitled to a half of the entire property. The learned District Judge held that the second part did not create any right in the property but only provided for a right to come into existence in the future on fulfilment of certain conditions. Relying on *Imam Baksh Khan v. Karim Shah* (3), *Sansar Singh v. Tiloka* (4) and *Bhan*

(1) [1896] 10 P. R. 1896.

(2) [1894] 120 P. R. 1894.

(3) [1895] 16 P. R. 1895.

(4) [1893] 51 P. R. 1893.



*Singh v. Thakar Das* (5) he held that the document did not require registration. In *Bhan Singh v. Thakur Das* (5) it was held that an agreement between certain persons providing the manner in which certain property should be divided between them in the event of their succeeding in purchasing the same was not an agreement that required registration. Under S. 17, Registration Act nontestamentary instruments purporting or operating to create or declare, whether in present or in future, any right, title or interest, whether vested or contingent, of the value of one hundred rupees and upwards, to or in immovable property must be registered. As held in *Bhan Singh v. Thakur Das* (5) the words "in future" relate to the preceding infinitives and not to the succeeding nouns and therefore the right, title or interest, whether vested or contingent, must be a present and not a future right, title or interest; or as held in *Imam Bakhsh Khan v. Karim Shah* (3) the document, to fall under the section, must itself purport or operate to create the right, etc., contemplated by the section. The question, therefore is whether by this particular document any right in future was created. This question is not free from difficulty, but after a careful consideration of the terms of the document itself we feel constrained to hold that it does not fall within the view of S. 17 (1) (b), Registration Act. This section of the Act read with S. 49 must, we think, be very strictly construed, imposing as it does such grave disqualifications for non-observance of registration, and we think that the benefit of any doubt should be given in favour of the document not being compulsorily registrable. The present document recites that a certain contract had already been entered into and that in the event of certain happenings a certain future right would accrue in favour of Ahmad Shah. This right was to pay half of the expenditure and receive half of the property, and this right could only come into existence when Pandit Mul Chand had carried out his part of the bargain. The document only entitled Ahmad Shah to a right which was to come into existence in the future.

In many respects the terms of this document are similar to those of that considered in *Imam Bakhsh Khan v.* (5) [1908] 89 P. R. 1908.

*Karim Shah* (3) which was held not to be liable to registration. We therefore hold that the view taken by the learned District Judge is correct and the document in this case did not require to be compulsorily registered and was admissible. Mr. Sethi next contended that the deed of 21st September 1905 was a deed of compromise and not a deed of partition, but we are unable to accede to this proposition. A reference to that document clearly shows that Khunshi Muhammad and Amir Chand recognised Pandit Mul Chand's claim and that the three of them partitioned the two Ahatas inter se. Finally it was contended that Ahata No. 2899 was the property of Bahadur Shah and not of Ahmad Shah and that therefore the agreement between Ahmad Shah and Pandit Mul Chand could not relate to this part of the property. Here again we are unable to agree. Bahadur Shah was a minor of very tender years and it is clear that Ahmad Shah was the real acquirer of this Ahata and that he actually made payments in connexion therewith. In our opinion therefore the conclusions arrived at by the lower appellate Court are correct and we accordingly dismiss this appeal with costs.

R.M./R.K.

*Appeal dismissed.*

### A. I. R. 1919 Lahore 62

SCOTT-SMITH AND LESLIE JONES, JJ.

*Mt. Satto and others*—Plaintiffs—Appellants.

v.

*Amar Singh and others*—Defendants—Respondents.

First Appeal No. 285 of 1915, Decided on 7th April 1919, from decree of Sub-Judge, Shahpur, D/- 10th November 1914.

**Civil P. C. (5 of 1908), S. 149—Insufficient court-fee on memorandum of appeal—Permission to make up deficiency should not be granted where mistake is not bona-fide.**

Where insufficient court-fee has been paid on a memorandum of appeal, the Court will not, in its discretion under S. 149, allow the deficiency to be made up on the day of the hearing unless it is satisfied that some grounds exist for the exercise of its discretion. Where therefore a memorandum of appeal had been insufficiently stamped, and it appeared that in the lower Court also the plaint was insufficiently stamped but upon objection being taken court-fees were realized ad valorem upon the market-value of the land in suit:

*Held:* that under the circumstances the mistake was not a bona fide one and did not deserve



the exercise of the discretion vested in the Court under S.149 44 I.C. 398, *Foll.*; 49 I.C. 188, *Dist.* [P 63 C 1,2]

*Fazl-i-Hussain*—for Appellants.

*Muhammad Shafi, Sheo Narain and M. L. Puri*—for Respondents.

**Judgment.**—In this and in the connected appeals, Nos. 286 and 287 of 1915, Pandit Sheo Narain on behalf of Amar Singh, the chief defendant-respondent, raises the preliminary objection that the memoranda of appeal are insufficiently stamped and asks that the appeals should therefore be dismissed. He points out that the stamps on these appeals are Rs. 195, Rs. 54-12-0 & Rs. 40 respectively, whereas they should be Rs. 1015, Rs. 385 and Rs. 285 respectively. In the lower Court the plaints also were insufficiently stamped and upon objection being taken court-fees were realised ad valorem upon the market value of the land in suit in each case. The propriety of the lower Court's order in this respect has never been and is not now questioned. Counsel for the appellants say that they are now prepared to pay up the deficient amount of court-fees and ask that the Court should exercise its discretion under S. 149, Civil P. C., and allow the balance to be now paid. All the appeals were filed by Mr. Asquith, pleader; and the contention on behalf of the appellants is that the mistake was his and that they are not to blame. Pandit Sheo Narain however urges that the plaintiffs, having had to make up the deficiency of court-fees in the lower Court, knew perfectly well how much they had to pay upon the memoranda of appeal and that their Pleader also must have known, as he filed copies of the decrees which showed the amount of court-fees upon the plaints. He urges that there was gross negligence both on the part of the appellants and on that of their pleader. He cites the case reported as *Saidunnessa v. Tejendra Chandra Dhar* (1). In that case, where insufficient court-fee had been paid on a memorandum of appeal, it was held that the Court would not in its discretion under S. 149, Civil P. C., allow the deficiency to be made up on the day of the hearing, unless it was satisfied that some grounds existed for the exercise of its discretion. Of these grounds the principal one is that a bona fide mistake was made. It is contended by Pandit Sheo Narain that in

the present case no bona fide mistake at all was made. For the appellants *Sahibji v. Piru* (2) is cited, but in that case the Court was satisfied that the deficiency in the court-fee was due to a bona fide mistake on the part of the appellant's pleader. The case is distinguishable from the present one. In our opinion *Saidunnessa v. Tejendra Chandra Dhar* (1) cited by Pandit Sheo Narain is in point, and after considering all the circumstances of the case we do not think that we should exercise the discretion vested in us under S. 149, Civil P. C. We accordingly dismiss the appeals with costs.

R.M./R.K.

*Appeal dismissed.*

(2) [1919] 10 P. R. 1919=49 I. C. 188.

### A. I. R. 1919 Lahore 63

SHADI LAL AND DUNDAS, JJ.

*Bua Ditta*—Plaintiff—Appellant.

v.

*Ladha Mal*—Defendant—Respondent.

First Appeal No. 2798 of 1915, Decided on 17th July 1919, from order of Sub-Judge Gujrat, D/- 29th June 1919.

(a) Court-fees Act (1870), S. 7 (4) (c) and Sch. 2, Art. 17—Prayer for general relief is not necessarily one for consequential relief.

The mere prayer for general relief is not necessarily a prayer for consequential relief so as to take the suit out of the class of suits for declaration only. [P 64 C 1]

(b) Court-fees Act (1870), S. 7 (4) (c) and Sch. 2, Art. 17—Suit for declaration that decree passed against plaintiff shall not affect him is one for declaration only—It is not maintainable without prayer for injunction, etc.

Plaintiff sued for a declaration that a certain decree being based on fraud shall not affect his rights and for any other relief which the Court might deem fit to grant. The Subordinate Judge, holding that this was a suit for a declaratory decree and other consequential relief, called upon the plaintiff to pay ad valorem court-fee and on his failure to do so, rejected his plaint. The plaintiff appealed.

**Held:** that the suit as brought was one for a declaration only.

That a suit for a mere declaration was not competent in this case, unless followed by a prayer for consequential relief by injunction or otherwise. [P 64 C 2]

That the Court ought to have allowed the plaintiff an opportunity to amend his plaint so as to include the necessary prayer for consequential relief by injunction or otherwise. [P 64 C 2]

*Shujauddin*—for Appellant;

*Mehr Chand*—for Respondent.

**Judgment.**—The plaintiff-appellant brought a suit asking for a declaratory decree to the effect that the award of an arbitrator as well as a decree passed

(1) [1918] 44 I. O. 898,



against him on the strength of this award being based on fraud, should not have any effect against his rights and also asking for any other relief which according to justice and circumstances of the case the Court might deem fit to grant. The learned Senior Subordinate Judge has held this to be a suit asking for a declaratory decree and other consequential relief, in which the plaintiff is bound to value the relief which he seeks and pay a court-fee thereon under S. 7 (iv) (c), Court-fees Act, and as the plaintiff had valued his suit at Rs. 14,750, he called upon him to pay a court-fee on that valuation and on his failure to do so has rejected his plaint under O. 7, R. 11, Civil P. C. The plaintiff appeals.

We are satisfied that the mere prayer for general relief is not necessarily a prayer for consequential relief so as to take the suit out of the class of suits for declaration only, and on this point we do not think that the decree of the learned Senior Subordinate Judge can be supported. But it is argued for the defendant-respondent that a suit for a mere declaration does not lie in this case. There is no Punjab authority directly in point, at least none has been quoted to us, and we have been compelled to fall back on rulings of other High Courts in which there is perhaps some apparent conflict. The first case directly in point is *Shrimant Sagajirao v. Smith* (1). The suit was one brought by a judgment-debtor for a declaration that a money decree obtained against him by the defendant was null and void. The question was whether court-fee should be levied under S. 7 (iv) (c) or under Art. 17, Sch. 2, Court-fees Act. Having reviewed the decisions there quoted, the learned Judges observed that some of them were based on ascertained facts in which the Judges were in a position to say what the real claim was. In such cases the plaintiff is usually called upon to value his relief. In that case however the Court had no knowledge beyond that derived from the plaint, nor was it in a position to say whether the case was one to which the proviso to S. 42, Specific Relief Act, applied. The conclusion arrived at was that on the plaint the suit was apparently one for a mere declaration and that a court-fee of Rs. 10 might be paid accordingly. This decision was followed in

the Calcutta High Court in *Zinnat-unnessa Khatun v. Girindra Nath Mukerjee* (2). In that case the plaintiffs asked to have it declared that certain decrees were ineffectual and inoperative against them, and it was remarked:

"The safest course in these cases is to ascertain what the plaintiff actually asks for by his plaint and not to speculate upon what may be the ulterior effect of his success. It may very well be that as the result of setting aside the decree in question some ulterior benefit may directly or indirectly flow to the plaintiff. But what we have to look at is what he asks for by his plaint. It is clear, looking at the plaint, that all that the plaintiff asks for is a declaratory decree and he does not for any consequential relief. The case of *Shrimant Sagajirao v. Smith* (1) accords with this view."

The views taken in the above two decisions have not been followed in a recent Full Bench decision of the Madras High Court in *Arunachalam Chetty v. Rangaswamy Pillai* (3). In that case it was remarked that a decree declaring that a decree is not binding on the plaintiff had the effect of cancellation of the decree and did not bear the appearance of a mere declaratory decree, although the case might be different where a declaration was sought by a person who was not a party to the decree impugned. In a case like that the suit might properly be regarded as one for declaration only, but in other cases where the plaintiff seeks for consequential relief it was more properly a suit to get rid of an already existing obligation. The Full Bench concluded that a suit to avoid a decree passed against the plaintiff was in any case a suit for a declaratory decree with consequential relief within the meaning of Cl. (iv) (c), S. 7, Court-fees Act. This view was followed by other Judges in Madras in *Ramanathan Chettiar v. Annamalai Chetty* (4), where it was held that a suit to declare that a decree is fraudulent and void will not lie unless followed up by a prayer for consequential relief, such as an injunction restraining the decree-holder from executing the decree. We are of opinion that this decision can well be applied in the present case. It is clear that a partition decree for the possession of immovable property has been passed in this case; although we are not in a position to say whether it has actually been executed, but if not, it is presumably capable of execution. We must therefore accept

(2) [1903] 30 Cal. 788.

(3) [1915] 38 Mad. 922=28 I. C. 79.

(4) [1915] 29 I. C. 132.

(1) [1896] 20 Bom. 736.



the appeal, set aside the order of the Senior Subordinate Judge and direct him to allow the plaintiff an opportunity to amend his plaint so as to include the necessary prayer for consequential relief by injunction or otherwise against the defendant and to value his relief and to pay court-fees on his valuation. It will of course, be open to the learned Judge to again reject the plaint, should the plaintiff fail to comply with these orders. No order is passed as to costs in this Court.

R.M./R.K. *Appeal accepted.*

### A. I. R. 1919 Lahore 65

SCOTT-SMITH AND WILBERFORCE, JJ.

*Mt. Satto and others*—Petitioners.

v.

*Amar Singh and others*—Opposite Parties.

Civil Misc. No. 330 of 1919, and Civil Appeal No. 285 of 1915, Decided on 17th October 1919, against judgment and decree in Civil Appeal No. 285 of 1919, D/- 7th April 1919.

(a) Civil P. C. (1908), S. 110—Appeal dismissed by High Court for insufficiency of court-fee—Decree is affirmed.

A decree of the High Court dismissing an appeal on account of insufficiency of court-fee is one affirming the decree of the first Court within the meaning of S. 110, Civil P. C.

[P 65 C 2]

(b) Civil P. C. (1908), S. 110—Refusal by High Court to allow deficiency of court-fee to be made up is not question of law within S. 110.

A refusal by the High Court to show any indulgence under S. 149, Civil P. C., and allow the deficiency in court-fee to be made good is not a question of law within the meaning of S. 110, Civil P. C.

[P 65 C 2]

*Fazl-i-Hussain*—for Petitioners.

*Sheo Narain and M. L. Puri*—for Opposite Parties.

**Order.**—In this case plaintiffs' suit was dismissed by the first Court and an appeal to this Court was dismissed on the ground that the memorandum of appeal bore insufficient court-fee, the court-fee payable on appeal being obviously the same as in the first Court. It was held that considering the general circumstances and in view of the absence of any bona fide mistake the Court would not in its discretion under S. 149, Civil P. C., allow the deficiency to be made up on the day of hearing. Against this decision a petition is preferred for leave to appeal to their Lordships of the Privy

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Council. The petition is contested on the ground that the decree of this Court affirmed the decision of the lower Court and that the appeal did not involve any substantial question of law. Counsel for the petitioners contended in a lukewarm fashion, with no authority to support him, that the dismissal of an appeal on account of insufficiency of court-fee did not amount to the affirmation of the decree of the first Court and that a question of law was involved in the refusal by this Court to allow any indulgence under S. 149. On the other hand, counsel for the respondents cited *Krishnasami Panikondar v. Ramasami Chettiar* (1) and *Ram Karan v. Madhukar Prasad* (2) as authorities that the judgment of this Court dismissing the appeal must be considered as one affirming the decision of the Court below. Counsel for the respondents also referred to *Krishnasami Panikondar v. Ramasami Chettiar* (1), *Muhammad Abdul Ghafur Khan v. Secy. of State* (3) and *Bhagat Singh v. Jai Ram* (4) as instances in which similar petitions were held not to involve any substantial question of law. We have no hesitation in holding that the decree of this Court affirmed the decision of the lower Court, and that the appeal to the Privy Council does not involve any substantial question of law.

Counsel for the petitioners in ground 4 (c) of the petition asks for decision whether the court-fee was correctly levied in the first Court. We may note in this connexion that no objection on this point were made against the order of the first Court either in that Court or in the grounds of appeal to this Court. The petition moreover does not even now contest the correctness of the order of the first Court. The point is clearly not one of those at issue. For the reasons given above we dismiss the petition with costs.

R.M./R.K. *Petition dismissed.*

(1) [1912] 16 I. C. 486.

(2) A. I. R. 1915 All. 327=29 I. C. 469.

(3) A. I. R. 1914 All. 54= 23 I. C. 532=36 All. 325.

(4) [1915] 22 P. R. 1915=26 I. C. 402.



**A. I. R. 1919 Lahore 66 (1)**

MARTINEAU, J.

*Jagat Singh and others*—Defendants—Appellants.

v.

*Sundar Singh*—Plaintiff—Respondent.

Misc. Second Appeal No. 1039 of 1919, Decided on 8th October 1919, against an order of Addl. Dist. Judge, Lahore, D/- 3rd January 1919.

(a) **Guardians and Wards Act (1890), S. 41(2)**—Guardian—Discharge of—Express order of discharge is necessary.

In the absence of an express order discharging him, the guardian of a minor is not relieved of his liability to render accounts. An order that nothing is due from the guardian according to the account filed by him does not operate as a discharge. [P 66 C 1]

*C. H. Oertel*—for Appellants.*Ganpat Rai*—for Respondent.

**Judgment.**—One Gurdit Singh was appointed by the Court to be the guardian of the plaintiff. He died in 1913. The plaintiff who came of age in January 1918, has brought the present suit against Gurdit Singh's son and the surety to recover Rs. 1,188-13-0 which he alleges to have been due to him from Gurdit Singh. The Subordinate Judge held that Gurdit Singh had been discharged under S. 41 (4), Guardians and Wards Act, by an order passed by him on 9th April 1918, and that the suit was therefore not maintainable. The District Judge on appeal has differed from the view taken by the Subordinate Judge and has remanded the case for disposal of the other issues.

The only question is whether Gurdit Singh was discharged by the order of 9th April 1918. As the learned District Judge points out, it is difficult to see how the order could be regarded as one discharging Gurdit Singh when the latter had died some years before it was passed. Further it has been held in *Amar Nath v. Raghat Rai* (1) that a guardian is not relieved of his liability to render accounts unless there is an express order discharging him. In the present case it does not appear that there was either an express or an implied order discharging Gurdit Singh. What the Subordinate Judge said in the order of 9th April 1918 was that nothing was due from Gurdit Singh according to the account filed him, but he did not say that he accepted the account as correct. I agree therefore with the lower appellate Court

(1) [1918] 25 P. R. 1918=41 I. C. 244.

that Gurdit Singh was not discharged, and I dismiss the appeal with costs.

R.M./R.K.

*Appeal dismissed.***A. I. R. 1919 Lahore 66 (2)**

RATTIGAN, C. J.

*Ganga Ram*—Plaintiff—Petitioner.

v.

*Nanda*—Defendant—Opposite Party.

Civil Revn. No. 116 of 1919, Decided on 21st October 1919, for revision of a decree of Munsif, First Class, Kangra, D/- 3rd/4th December 1918.

**Limitation Act (1908), Art. 52**—Suit to recover price of articles sold is governed by Art. 52—Punjab Loans Limitation Act (1904).

A suit to recover a sum of money as representing the price of certain articles sold by the plaintiff to the defendant, is governed by Art. 52 as extended by the Punjab Loans Limitation Act. [P 66 C 2]

*Mehr Chand Mahajan*—for Petitioner.

**Judgment.**—The respondent has been served with notice of today's hearing, but has not appeared nor has he been represented at the hearing before me. I accordingly proceed to decide the petition ex parte. From the claim it is quite clear that the plaintiff is suing for a sum of money as representing the price of certain articles sold by him to the defendant, and to such a suit Art. 52, Lim. Act, is clearly applicable and not Art. 115. The lower Court has found on the merits in favour of the plaintiff and as it dismissed his suit simply on the ground that it was barred under Art. 115, whereas it is within time under Art. 52, Lim. Act, as extended by the Punjab Loans Limitation Act, I accept the petition and grant the plaintiff a decree for the amount claimed with costs.

R.M./R.K.

*Petition accepted.***A. I. R. 1919 Lahore 66 (3)**

SHADI LAL, J.

*Gokal Chand*—Plaintiff—Appellant.

v.

*Hukam Chand and others*—Defendants—Respondents.

Second Appeal No. 3342 of 1916, Decided on 5th February 1918, from decree of District Judge, Jullundur, D/- 29th August 1916.

**Limitation Act (9 of 1908), Art. 120**—Suit for declaration of title—Plaintiff in possession—Adverse entry in Record of Rights—Limitation runs not from date of entry but from attempt to dispossess.

A declaratory suit brought by a plaintiff who has all along been in enjoyment of the property



is not barred simply because an entry adverse to his rights was made or because he came to know of that entry more than six years prior to the institution of the suit.

Even if the right to demand correction of the revenue entries is lost by limitation, the plaintiff is entitled to a declaration of his proprietary title, the period of limitation running from the date when the defendant attempted to oust the plaintiff from the property.

Where therefore in a suit for a declaration to the effect that plaintiff was owner of 1/12th share in certain lands and not of a 1/18th share only as recorded in the revenue papers, it appeared that the income derived from the land was spent on the upkeep of certain joint family property in which the plaintiff had a 1/12th share which share had been awarded to him.

*Held:* that the cause of action arose when the plaintiff asked the Revenue Officer to make an entry in his favour and the defendants denied his title. [P 67 C 2]

*Manohar Lal and Badri Das*—for Appellant.

*Gokal Chand Narang* — for Respondents.

**Judgment.**—This second appeal arises out of an action brought by the plaintiff-appellant for a declaration that he is owner of 1/12th of a plot of land known as Thaprana and not of 1/18th only as recorded in the revenue papers. The learned District Judge, dissenting from the Court of first instance, has dismissed the suit upon the ground that it is barred by time under Art. 120, Lim. Act, and after hearing arguments on both sides and considering the authorities cited by the learned counsel I am of opinion that the decision of the lower appellate Court cannot be sustained.

An abstract of the revenue entries relating to the land in dispute is given in the judgment of the lower appellate Court, and there can be no manner of doubt that the entries have for more than 30 years been against the plaintiff and that he had knowledge of those entries more than six years prior to the institution of the suit. It is common ground that the rule of limitation applicable to the suit is that prescribed by Art. 120, and the only question for determination is whether the terminus a quo is the date of the adverse entry, or the knowledge thereof, or lastly the date when the defendants attempted to oust the plaintiff from the property. Now there is no reliable evidence that the defendants denied the plaintiff's right more than six years before the date of the institution of the suit, indeed all the evi-

dence goes to show that the income derived from the land is spent on the upkeep of certain joint family property in which the plaintiff had 1/12th share and that share has, it appears, been awarded to him. I am not prepared to assent to the proposition that an action brought by the plaintiff, who has been all along in the enjoyment of the property would be barred by time simply because an entry adverse to his rights was made or that he came to know of that entry more than six years prior to the institution of the suit. Indeed there is ample authority for the proposition that even if the right to demand correction of the revenue entries is lost by limitation the plaintiff is entitled to a declaration of his proprietary title, the period of limitation running from the date when the defendants attempted to oust the plaintiff from the property: vide inter alia *Hakim Singh v. Waryaman* (1) and *Nathu v. Buta* (2).

The cause of action in the present case arose when the plaintiff asked the Revenue officer to make an entry in his favour and the defendants denied his title. This event admittedly took place within the prescribed period of limitation, and the suit is consequently not barred by time. For these reasons I accept the appeal and reversing the decree of the lower appellate Court remit the case for decision on the remaining points. The court-fee on the memorandum of appeal shall be refunded, and other costs shall abide the event,

P.M / P.K

*Appeal accepted.*

(1) [1907] 10 P. R. 1907.

(2) [1881] 27 P. R. 1881.

## A. I. R. 1919 Lahore 67

RATTIGAN, C. J.

*Bela Singh*—Convict—Petitioner.

v.

*Emperor*—Opposite Party.

Criminal Petn. No. 1389 of 1916, Decided on 3rd January 1918, from order of Dist. Magistrate, Lyallpur, D/- 19th July 1917.

Criminal P. C. (5 of 1898), Ss. 90 and 514—Trial under S. 498, I P. C.—Issue of warrant against woman—Reasons not recorded—Surety for attendance—Warrant being illegal surety's bond is not forfeited—Penal Code (45 of 1860), S. 498.

In a case under S. 498, I. P. C. the trying Magistrate is competent to issue a warrant instead of issuing a summons for the attendance of the woman alleged to have been enticed away, but, in order to comply with the provisions of S. 90



Criminal P. C., it is necessary to record reasons for issuing the warrant in the first instance and if the Magistrate fails to do so, the warrant must be regarded as wholly illegal and the bond given by the surety for the woman's attendance has no legal force and cannot be forfeited if the woman does not appear. [P 68 C 1]

*L. C. Mehra*—Petitioner.

*Govt. Advocate*—for the Crown.

**Judgment.**—In this case it was competent to the Magistrate who tried the case to issue a warrant for the attendance of the woman in question instead of issuing a summons, but in order to comply with the provisions of S. 90, Criminal P. C., it was necessary for him to record his reasons in writing for issuing the warrant in the first instance. No such reasons were recorded in the present case and upon the authority of *Sukheswar Pukan v. Emperor* (1) the warrant must be regarded as wholly illegal. In these circumstances *Kala Singh v. King Emperor* (2) is authority for holding that the bond given by Bala Singh who stood surety for the woman's attendance has no legal force. I accordingly accept this application and set aside the order of the Magistrate, dated 12th July 1917, and of the District Magistrate dated 19th July 1917. The amount declared to be forfeited shall, if realized be refunded.

R.M./R.K. *Petition allowed.*

(1) [1911] 38 Cal. 789=42 Cr. L. J. 409=11 I. C. 593.

(2) [1907] 22 P. W. R. 1907 Cr.=6 Cr. L. J. 275.

## A. I. R. 1919 Lahore 68

SCOTT-SMITH, J.

*Committee of Notified Area, Una*—  
Defendant—Petitioner.

v.

*Chatar Behari Narain*—Plaintiff—  
Respondent.

Civil Revn. No. 839 of 1916, Decided on 12th February 1918, from decree of Munsif, 2nd Class, with powers of a Judge, Small Cause Court, Hoshiarpur, D/- 17th April 1916.

(a) Punjab Municipal Act (3 of 1911), Ss. 86 and 242—Imposition of illegal tax—Civil Courts' jurisdiction to grant relief is not ousted.

The power conferred by a special Act on a local authority to impose a particular tax for particular purposes in a specified manner does not oust the jurisdiction of the Civil Courts to give relief against an illegality committed by that body under cover of statutory powers.

[P 69 C 1]

A civil Court has jurisdiction to determine the question whether the imposition of a tax is

illegal and ultra vires and to give relief if a tax has been levied from a person who is not liable to pay the same. [P 69 C 1]

(b) Provincial Small Cause Courts Act (9 of 1887), Art. 1—Imposition of profession tax by Government—Munsif suing for declaration of nonliability—Suit not excepted from Small Cause Court—Munsif cannot be said to follow profession—Punjab Municipal Act (3 of 1911), Ss. 86 and 242.

The Punjab Government imposed a profession tax in the Una Notified Area and the plaintiff, a Munsif, was assessed to pay the tax. He paid it under protest and then brought a suit for the recovery of the amount:

*Held:* (1) that the suit was not one concerning an act purporting to be done by any person by order of the Local Government and was not therefore excluded from the jurisdiction of a Court of Small Causes; [P 68 C 2]

(2) that the Munsif could not be said to follow a profession in the popular sense of the term and the Government could not have intended that he should be liable to pay a profession tax.

[P 69 C 1]

*Bhagat Govind Das*—for Petitioner.

*Mul Chand* for *Moti Sagar*—for Respondent.

**Judgment.**—The Punjab Government in exercise of its powers under S. 242, Punjab Municipal Act, has imposed a profession tax in the Una Notified Area. Amongst those assessed to pay this tax by the Committee of the Notified Area was the plaintiff Lala Chatar Behari Narain, Munsif, at that time occupying a house within the notified area. He paid the tax Rs. 40 under protest and then brought the present suit against the Committee of the Notified Area for recovery of the amount. The case was heard by a Small Cause Court Judge who decreed the claim in full. The Committee of the Notified Area has filed an application for revision in this Court. Three points were argued before me on behalf of the petitioner committee, viz., (1) that the case was not triable by a Court of Small Causes; (2) that the Civil Court had no jurisdiction to hear the suit; and (3) that the Munsif was exercising a profession and was therefore liable to pay the tax. As regards the first point, it was urged that the suit was excluded from the jurisdiction of the Court of Small Causes by Art. 1, Sch. 2, Small Cause Courts Act. In my opinion the Article in question is not applicable. The suit cannot be said to be one concerning an act purporting to be done by any person by order of the Local Government. The Local Government in the present case no doubt imposed the tax but the Committee of the Notified Area had to prepare



and did prepare a list of the persons liable to pay the tax. The suit therefore concerns the levy by the Committee of the tax from the plaintiff. As regards the second point the appellants rely upon S. 86, Municipal Act, which lays down that

"No objection shall be taken to any valuation or assessment, nor shall the liability of any person to be assessed or taxed be questioned, in any other manner or by any other authority than is provided in the Act and also that no refund of any tax shall be claimable by any person otherwise than in accordance with the provisions of this Act and the rules thereunder.

It has however been held frequently that the power conferred by a special Act on a local authority to impose a particular tax for particular purposes in a specified manner does not oust the jurisdiction of the civil Court to give relief against an illegality committed by that body under cover of statutory powers. I think it is clear that a civil Court has jurisdiction to determine the question whether the imposition of a tax is illegal and ultra vires and to give relief if a tax has been levied from a person who is not liable thereto.

The third point is whether it can be said that the Munsif followed a profession. The lower Court has gone into this matter very thoroughly and has come to a reasonable conclusion. In my opinion it cannot be said that the Munsif follows a profession in the popular sense of the term and I do not think that Government can have intended that he should be liable to pay a profession tax. Whether this be so or not, I do not think that this Court should go into the matter in revision. The petition for revision is accordingly rejected with costs.

R.M./R.K.

*Petition rejected.*

### A. I. R. 1919 Lahore 69

CHEVIS, J.

*Muhammad Usman*—Appellant.

v.

*Rahim Bakhsh*—Respondent.

Second Appeal No. 25 of 1917, Decided on 19th January 1918, from the decree of Addl. Dist. Judge, Delhi, dated 10th October 1916.

**Evidence Act (1872), S. 90 — Power to draw presumption is discretionary—If properly drawn appellate Court is slow to interfere.**

The question of making a presumption with regard to the genuineness of a document under

S. 90 is one in which the Court has to exercise its discretion and when that discretion has been exercised with due care and the presumption allowed by law has been made, an appellate Court should be slow to interfere with such discretion. [P 70 C 2]

*Kirkpatrick*—for Appellant.

*Moti Sagar*—for Respondents.

**Judgment.**—The question in this appeal is whether the defendant purchaser from Saudagar Mal is a permanent tenant of the property in suit. The contention centres round a lease executed by Saudagar Mal in 1873. This lease is over 40 years old, but the first Court declined to make the presumption allowed by S. 90, Evidence Act. The District Judge on appeal made this presumption and gave plaintiff a decree for possession allowing defendant six months for removing his materials.

Mr. Kirkpatrick at first contended that this lease does not cover the property in suit. No such contention seems to have been raised in the lower Courts, and Mr. Kirkpatrick did not press the matter but confined himself entirely to arguing that the District Judge was wrong in presuming in favour of the lease. Mr. Kirkpatrick refers *Amir v. Nur Muhammad* (1) and urges that forgery and fraud are frequent in Delhi, and that special care must be taken before a document can be accepted as genuine. But I note that the Additional District Judge, Mr. Clifford, whose order is under appeal, resided for long years in Delhi, and if ever there was a judicial officer who could claim an intimate acquaintance with Delhi people and their customs I should say Mr. Clifford could. He has carefully considered the case, and I should be slow to interfere with a decision of his in such a case as the present, which rests on the question whether the presumption allowed by law should be made or not. Mr. Clifford's main reason, or at least one of his main reasons, for presuming the lease to be genuine is that it was:

"filed with the plaintiff of 1904 when Saudagar Mal was alive and that it is difficult to believe that plaintiffs would have produced a forged lease during his lifetime."

Mr. Kirkpatrick points out that it is not correct to say that it was filed with the plaintiff. It was filed at a late stage of the case, and Mr. Kirkpatrick urges that as Saudagar Mal did not appear to

(1) [1902] 82 P. R. 1902.



contest the suit there was no danger in putting in a forged lease. But the lease was distinctly mentioned in the plaint, so I presume that plaintiffs had it in their possession when the plaint was written, and I certainly cannot presume that plaintiffs were aware when their plaint was drawn up that Saudagar Mal was not going to contest their claim.

As for the District Judge's finding that the land in the Rui Mandi must have been acquired by Saudagar Mal in the end of 1872 or the beginning of 1873, there is of course no direct evidence as to when he got this land, but the District Judge makes an inference from the previous history of the relations between Saudagar Mal and the plaintiffs and I am not at all prepared to say that the District Judge's reasoning is incorrect.

I think the learned District Judge has given good reasons for making the presumption allowed by S. 90. It is a matter in which the Court has to exercise its discretion and when that discretion has been exercised with due care, and the presumption allowed by law has been made as in the present case, an appellate Court should be slow to interfere with such discretion: vide *Shafiq-un-nissa v. Shaban Ali Khan* (2). In fact it is argued on behalf of the respondents that the question involved is one of fact and not one of law, and here. *Parankusa Zatinrda Mahadesikaswami v. Subramania Pillai* (3) is quoted, a case in which the learned Judges differed; this however is a question which I do not think I need decide. I uphold the decision of the learned Additional District Judge except that I extend the period allowed for removing the malba till 19th July 1918 (see my orders dated 8th February 1917 and 23rd March 1917 passed in this case), in all other respects the Additional District Judge's decision is affirmed and the appeal fails. The appellant will pay cost in this Court.

R.M./R.K. *Appeal dismissed.*

(2) [1904] 26 All. 581.

(3) [1915] 26 I. C. 117.

### A. I. R. 1919 Lahore 70

SCOTT-SMITH AND LE-ROSSIGNOL, JJ.

*Mohan Lal*—Defendant—Appellant.

v.

*Damodar Das*—Respondent.

First Appeal No. 2134 of 1916, Decided on 18th February 1918.

Civil P. C. (5 of 1908) Sch. 2, Para. 17—**Arbitrator dying before application for filing agreement to refer to arbitrators is made rule of Court—Agreement becomes inoperative.**

An agreement to refer to arbitration becomes ipso facto inoperative by the death of an arbitrator before the agreement is made a rule of the Court.

Where therefore five arbitrators were named in an agreement to refer to arbitration and two of them had died before an application was made for the filing of the agreement in Court.

*Held*: that the agreement became incapable of performance and could not be filed in Court: 8 All. 340; 17 Mad. 498 and 12 I. C. 15 (P.C.) Dist. 12 B. L. R. App. 13 and 49 I. C. 911 *Rel. on.*

[P 71 C 2]

*Moti Sagar*—for Appellant.

*C. Bevan Petman and Santanam*—for Respondents.

**Jndgment.**—This is an appeal from the order of the District Judge of Delhi directing an agreement to be filed in Court under para. 17, Sch. 2, Civil P. C. The appeal was first argued before a single Judge of this Court who has referred it to a Division Bench, the particular question referred being whether an agreement to refer to arbitration becomes ipso facto inoperative by the death of an arbitrator before the agreement is made a rule of Court. In the present case there were five arbitrators named in the agreement and two of them had died before an application was made for the filing of the agreement in Court. Counsel for the respondents replied upon *Jones v. Ledgard* (1), *Bala Pattabhirama Chetti v. Seetharama Chetti* (2) and *Sadik Husain v. Kaniz Zeohra Begum* (3). In our opinion these authorities are distinguishable. *Jones v. Ledgard* (1) had reference to an application to file an award in Court. In *Bala Pattabhirama Chetti v. Seetharama Chetti* (2) one of the arbitrators refused to act after the agreement had been filed in Court, whereas in the present case two of the arbitrators died before even the application to file the agreement in Court was made. In *Sadik Husain v. Kaniz Zeohra Begum* (3) there was no application for the filing of the agreement in Court; it was already in Court being incorporated in a compromise upon which a decree had been passed and it was subsequent to this that one of the arbitrators refused to act. For the appellant *Brooke v.*

(1) [1886] 8 All. 340.

(2) [1894] 17 Mad. 498.

(3) [1911] 33 All. 743=14 O. C. 289=12 I. C. 15 (P.C.).



*Surdyal* (4) and *Ma Ba U v. Maung Pe Lan* (5) were relied upon.

*Brooke v. Surdyal* (4) was a case in which there had been an agreement for reference to three arbitrators one of whom had refused to act and the other two had decided to go on with the reference. Pontifex, J., remarked:

"After an agreement such as that now before me has been executed any person who is a party to it is entitled to apply to the Court to have such agreement filed and no party to such an agreement could hope successfully to oppose such application if all the arbitrators named in it were alive and willing to act. But it is quite a different thing when upon making such an application a party to the agreement is able to come in and show that before the application was made one of the arbitrators named in the deed had in fact died or as in this case had refused to act in the matter. In such a case I think the contention is right that the reference to the arbitration agreed upon between the parties no longer exists so as to enable the Court to direct that it should be filed and if it were filed I do not think the Court could exercise the powers of appointing a new arbitrator because the arbitrator who has refused to act, refused before the order of reference, directed by S. 326, was made by the Court."

That ruling was under the Civil P. C. of 1859, but the provisions of that Code in regard to an application to file an agreement were not materially different from those of the present Code. The case reported *Ma Ba U v. Maung Pe Lan* (5) is a decision of the Lower Burma Chief Court under the present Code in which it was held that apart from any enactment an agreement to refer a matter to certain specified arbitrators becomes void and of no effect if one or more of the arbitrators die or refuse to act and thus make the agreement incapable of performance. It was held that in such a case the Court had no jurisdiction under Cl. (4) of para. 17, Sch. 2, Civil P. C., to make a reference to the arbitrators. In our opinion the reasoning contained in this ruling is sound. Sub Cl. (4), Cl. (17), Sch. 2, Civil P. C., is as follows:

"Where no sufficient cause is shown the Court shall order the agreement to be filed and shall make an order of reference to the arbitrator appointed in accordance with the provisions of the agreement."

In the present case certain specified arbitrators are named in the agreement and we fail to see how an order of reference could be made to those arbitrators if one or more of them had died before the agreement was filed in Court. The

actual agreement to refer the matter in dispute to five specified arbitrators became incapable of performance when one of those arbitrators died. This in our opinion is a sufficient reason for refusing to file the agreement in Court. Cl. 19 has been referred to by counsel for the respondents, but as pointed out by the Burma Chief Court, Cl. 19 only comes into operation when an order of reference has been made under Cl. 17. Mr. Petman for the respondents has not cited any authority in support of the proposition that an agreement should be filed in Court if one or more of the arbitrators named therein have died prior to the making of the application. We therefore accept the appeal and setting aside the order of the lower Court reject the application for filing the agreement with costs in both the Courts.

R.M./R.K.

*Appeal accepted.*

## A. I. R. 1919 Lahore 71

SCOTT-SMITH, J.

*Hazara Singh and others*—Appellants.  
v.

*Bishen Singh and another*—Respondents.

First Appeal No. 3455 of 1916, Decided on 4th February 1918.

(a) Custom (Punjab)—Succession—Gariwal Jats of Ludhiana—Collaterals exclude daughter.

Among Gariwal Jats of the Ludhiana District there is a special custom contrary to general custom whereby daughters are excluded from succession to self-acquired property by collaterals. [P 72 C 2]

(b) Civil P. C (1908), O. 41, R. 23—Remand.

The mere fact that a particular ruling was not cited in the lower Court does not give the party any right to claim a remand. [P 72 C 2]

*Nand Lal*—for Appellants.

*N. C. Mehro*—for Respondents.

**Judgment.**—This judgment disposes of two connected appeals Nos. 3455 and 3471 of 1916. The suit out of which the appeals arise was brought by the plaintiffs Achal Singh and others for the land of Fateh Singh whose collaterals they claimed to be. Besides them there were two other sets of claimants, (1) Mt. Mohan Kaur, defendant 1, daughter of Fateh Singh, and (2) defendants 2 to 31, Hazara Singh and others who alleged that the land in suit was gifted to Fateh Singh's grandmother Mt. Chandan by her brother Bhangra Singh. They say that they are Collaterals of Bhangra Singh and

(4) [1874] 12 B. L. R. App. 18.

(5) [1917] 42 I. O. 911.



as the male line of the donee Mt. Chandan is now extinct they are entitled to succeed as reversionary heirs of the donor. The case was tried by Lala Shibbu Mal, District Judge of Ludhiana, who on 30th June 1913 dismissed the plaintiffs' suit holding that they had no right to succeed to non-ancestral property in the presence of Fateh Singh's daughter but that they had a superior right to defendants 2 to 31 who in his opinion were not proved to be the collaterals of Bhanga Singh. From this order both plaintiffs and defendants 2 to 31 filed appeals which were decided by Mr. Craik, District Judge of Ludhiana, on 17th March 1915. This Court by its order of 21st October 1916 in Civil Appeal No. 1968 of 1915 set aside Mr. Craik's order holding that it had been passed without jurisdiction having regard to *Meugens v. Suttley Flour Mills, Ferozepore* (1). The appeals of the plaintiffs and defendants 2 to 31 from the order of Lala Shibbu Mal have therefore been now argued before me.

Out of defendants 2 to 31 Hira Singh and Mt. Nandi have died and Mr. Manohar Lal on behalf of the plaintiffs-appellants says that there is no necessity to bring their legal representatives on the record in the plaintiffs' appeal as their dispute is only with Mt. Mohan Kaur, the lower Court having held that his clients' rights are superior to those of defendants 2 to 31. I agree with him that Hira Singh and Mt. Nandi were not necessary parties in his clients' appeal. The appeal filed on behalf of defendants 2 to 31 may be disposed of in a few words. Dr. Nand Lal who appears for them frankly admits that the only evidence in support of their contention that they are collaterals of Bhanga Singh is that of the Hardwar Prohat who has been disbelieved by the lower Court. He has not shown any reason why I should disagree with the finding of that Court in regard to this man's evidence. I think it would be extremely unsafe to hold upon the uncorroborated evidence of this single witness that the alleged relationship is proved. Dr. Nand Lal also admits that the alleged gift by Bhanga Singh to Mt. Chandan of the land in suit is not proved. Under these circumstances his client's appeal must fail and is hereby dismissed

with costs to Mr. Manohar Lal's clients. With regard to the plaintiffs' appeal Mr. Manohar Lal relies upon *Partab Singh v. Panjabu* (2), in which it was held that among Gariwal Jats of the Ludhiana District there is a special custom contrary to general custom whereby daughters are excluded from succession to self acquired property by collaterals. The Court followed in this decision the case of *Mt. Ishar Kuar v. Raja Singh* (3), which has been reported as 29 Punjab Record 1911. These authorities were not quoted in the lower Court, but they are clearly applicable to the present case. Mr. Nihal Chand on behalf of Mt. Mohan Kaur is unable to cite any authority to the contrary. His contention is that had *Partab Singh v. Panjabu* (2) been shown to the lower Court the onus should have been shifted and his client would have produced evidence in proof of a special custom in her favour. He therefore asks that the case should be remanded for further inquiry. The onus was placed upon the plaintiffs by the lower Court and they discharged that onus partly by oral evidence and partly by citing authorities. The mere fact that a particular ruling was not cited in the lower Court does not in my opinion give the defendant any right to claim a remand. In her pleas Mt. Mohan Kaur relied generally on custom and did not allege that there was any special custom in the family of the parties. In the case reported as *Mt. Ishar Kuar v. Raja Singh* (3) the question was gone into exhaustively, and it is extremely unlikely that Mt. Mohan Kaur could prove any special family custom in her favour. I therefore accept plaintiffs' appeal and give them a decree for possession of the land and the house in suit with costs throughout against all the defendants.

R.M./R.K.

*Appeal accepted.*

(2) [1912] 25 P. R. 1912=13 I. C. 77.

(3) [1911] 29 P. R. 1911=9 I. C. 608.

### A. I. R. 1919 Lahore 72

SCOTT-SMITH AND SHADI LAL, JJ.

*Madan Mohan Lal and another* —  
Plaintiffs—Appellants.

v.

*B. Borooah and Co. of Delhi*—Defendants—Respondents.

First Appeal No. 2368 of 1914, Decided on 15th February 1918, from decree of Divl. Judge, Delhi, D/-20th June 1914

(1) [1915] 30 P. R. 1915=27 I. C. 625.



(a) Civil P. C. S. 11—What is, and not what ought to have been, decided is to be looked to.

In deciding the validity or otherwise of the defence of *res judicata*, the Court is concerned with what was actually decided and not with what ought to have been decided in the previous suit. [P 74 C 2]

(b) Civil P. C. (5 of 1908), S. 11—Court refusing to adjudicate upon certain issues—Doctrine of *res judicata* cannot apply in subsequent suit—Contract of lease oral—Subsequent exchange of letters recording fact need not be registered to be admissible in evidence—Registration Act (16 of 1908), S. 17 (1) (d) and S. 49.

Plaintiffs let the ground floor of their house to defendants from 1st January 1909. In the summer of 1911, a dispute arose between the parties with regard to the term of the tenancy and the extent of the property leased and the plaintiffs brought a suit for ejectment of the defendants from the house as well as two plots of land which according to the plaintiffs, did not form part of the property leased. The defendants thereupon instituted a counter-suit for the specific performance of an agreement to lease the property for a period of three years. The litigation dragged on till the defendants vacated the premises on 7th March 1912 and informed the Court accordingly which consequently declined to adjudicate upon the various issues arising between the parties and simply granted the plaintiffs a decree for possession of the property, expressly stating that the said issues might be determined in the suit for damages which was to be instituted by the plaintiffs. The present suit was then brought for damages for use and occupation on the allegations that the defendants were monthly tenants, that their tenancy was determined at the end of June 1911 by a notice to quit served on them in April 1911 and that thereafter they were in wrongful possession of the demised premises. It appeared that the parties had written to each other on 15th and 22nd January 1909 with regard to the matter of the lease and it was contended that these letters amounted to a lease for a term exceeding one year and not having been registered were inadmissible in evidence:

*Held:* (1) that inasmuch as the Court dealing with the former suit expressly refused to adjudicate upon any of the matters covered by the issues in the subsequent suit, the plaintiffs could not avail themselves of the doctrine of *res judicata* and the Court was competent to determine issues on the merits between the parties;

[P 74 C 2]

(2) that the contract between the parties was entered into orally and the letters subsequently exchanged between the parties were merely memoranda of a fact accomplished and could not therefore be excluded from evidence on the ground of want of registration;

[P 75 C 1]

(3) that the tenancy was for three years from 1st February 1909 to 31st January 1912 and the plaintiffs had no right to eject the defendants from the premises before the expiry of that period;

[P 75 C 1]

(4) that the defendants were liable to pay damages for use and occupation for the period subsequent to 31st January 1912.

[P 76 C 1]

(c) Landlord and Tenant—Tenant holding over wilfully and contumaciously—Damages

for use and occupation are assessed at double the rent.

In the case of a tenant holding over wilfully and contumaciously damages for use and occupation are assessed at double the ordinary rent.

[P 76 C 1]

*Raj Narain, K. Santanam and Madan Gopal*—for Appellants.

*Moti Sagar and S. N. Bose*—for Respondents.

**Judgment.**—The plaintiffs are the owners of a house situate on the Lothian Road inside the Kashniri Gate, Delhi. It is common ground that the ground floor of the house was let to the defendants, Messrs' B. Borooah and Company, from 1st February 1909 at a monthly rent of Rs. 111-11-6 and that in the summer of 1911 the parties fell out, the dispute relating to the term of the tenancy and the property compromised in the lease. The plaintiffs thereupon brought an action for the ejectment of the defendants from the house as well as two plots of land which according to the plaintiffs, did not form part of the property leased to the defendants and had been wrongfully taken possession of by them. The defendants replied by instituting a counter-suit for the specific performance of an agreement to lease the property for a period of three years. This suit was obviously a counterblast, the object being clearly to prevent the decision of the plaintiffs' suit before the commencement of the Coronation Durbar held in December 1911. In this object the defendants were successful, the litigations dragged on until after the Durbar with the result that they themselves vacated the premises on 7th March 1912 and then informed the trial Judge accordingly. The latter consequently declined to adjudicate upon the various issues arising between the parties, and simply granted the plaintiffs a decree for possession of the property, expressly stating that the said issues might be determined in the suit for damages which was to be instituted by the plaintiffs.

The present suit is for damages for use and occupation on the allegations that the defendants were monthly tenants, that their tenancy was determined at the end of June 1911 by a notice to quit served on them in April 1911 and that thereafter they were in wrongful possession of not only the two plots of land referred to above and a verandah constructed by the plaintiffs in November 1910, but also of



the house itself. The plaintiffs consequently claimed about Rs. 14,000 by way of damages from the defendants. The trial Judge has given his decision against the plaintiffs upon all the matters in controversy between the parties, and has passed a decree for Rs. 921-2-0, the rent due from 1st July 1911 to 7th March 1912, which rent was tendered by the defendants but was not accepted by the plaintiffs.

Against this decree the plaintiffs have preferred an appeal to this Court, and we have listened to the elaborate arguments advanced by Mr. Raj Narain for the appellants and Mr. Moti Sagar for the respondents. Upon the question of res judicata we have no hesitation in endorsing the opinion of the learned Divisional Judge, upon the short ground that the Court dealing with the former suit expressly refused to adjudicate upon any of the matters which are covered by the first three issues framed in this case. As observed already, the decree for possession was passed in that suit, because the defendants stated that the period of tenancy had expired on 31st January 1912 and that they had consequently vacated the premises. In these circumstances the Court held that it was unnecessary to determine the points relating to the nature of the tenancy, the property actually leased to the defendants, and the property alleged to have been trespassed upon by them, and expressed its opinion that these matters might be determined in the subsequent suit. Nor did the appellate Court, to which the plaintiffs went upon appeal, accede to their request for a decision on the merits. The judgment delivered by that Court shows that it confined itself to the question of costs, and that the remarks made therein apportioning the blame between the two parties were made with the sole object of deciding that question.

There is considerable force in the contention that the Court, which tried the former suit should have before decreeing possession, determined whether the plaintiffs had a cause of action on the date of the institution of that suit, and that it should not have awarded possession merely upon the strength of the circumstances which came into existence subsequent to that date. Now, the ground upon which the Court proceeded may be wrong, but there can be no manner of

doubt that in deciding the validity or otherwise of the defence of res judicata we are concerned with what was actually decided in the previous litigation, and not with what ought to have been decided. The following observations of their Lordships of the Privy Council in *Parso-tam Gir v. Narbada Gir* (1) are pertinent here:

"The question is not whether the judgment of the High Court in 1886 was right, but whether it did or did not finally decide the present question as between Nipal Gir and Narbada Gir. It would be a contradiction in terms to say that the Court had finally decided matters which it expressly left 'untouched and undecided.'"

Mr. Raj Narain for the appellants relies upon Expl. 4, S. 11, Civil P. C., which prescribes that any matter, which might and ought to have been made ground of defence or attack in the former suit, shall be deemed to have been a matter directly and substantially in issue in such suit. But the explanation does not place a constructive issue referred to therein upon any higher footing than the issues actually drawn in the case, and does not do away with the necessity of due compliance with the essential requirements of the rule of res judicata laid down in the section itself. There is however no scope for the application of this explanation to the present case, because it is clear that the parties had put forward all the grounds of attack and defence, which were duly embodied in clear and distinct issues. But the Court not only did not decide them but expressly excluded them from decision. It is therefore manifest that nothing was decided in that case which can be treated as res judicata. We accordingly hold that the plaintiffs are not entitled to avail themselves of the doctrine of res judicata, and we proceed to determine the issues on the merits. The first question, which requires decision, is the term of the tenancy. Now we may say at once that there is no reliable evidence in support of the plaintiffs' contention that the tenancy was a monthly one; indeed, all the evidence oral and documentary goes to show that it was for a period of three years. The plaintiffs, however, contend that the letters, dated 15th January and 22nd January 1909 respectively, exchanged between the parties amounted to a lease for a term exceeding one year, and were

(1) [1899] 21 All. 505=26 I. A. 175 (P.C.).



consequently compulsorily registrable under S. 17, Registration Act. The documents not having been registered are inadmissible in evidence; and oral evidence relating to the terms of the contract, which was reduced to writing, is shut out by the Evidence Act.

We have examined this contention in the light of all the circumstances of the case, and we are of the opinion that it has been satisfactorily established that the parties entered into a parol contract with respect to the lease of the property for three years, and that the letters in question should be regarded as merely memoranda of a *fait accompli*. It appears that negotiations in connexion with the lease of the property began some six months before the letters in question were written, and the evidence of Colonel Z. Ahmad shows that it was the plaintiff Madan Mohan Lal who wanted the tenancy to last for three years and that it was at his request that the witness suggested that period to the defendants.

Further, B. K. Borooah, the manager of the defendants' firm, who settled the matter with the plaintiff Madan Mohan Lal, swears that the contract between the parties was an oral one and that the letter of confirmation was taken with the object of forwarding it to their Head Office at Calcutta. It will be observed that Madan Mohan Lal, who was the only other person cognizant of the affair, has not gone into the witness-box; and in these circumstances we see no valid reason why we should not accept the version given by B. K. Borooah. Accepting his testimony, which receives support from other circumstances of the case, we hold that the contract between the parties was entered into orally, and that the letters cannot be excluded on the ground of want of registration. These documents and the oral evidence make it absolutely clear that the tenancy was for three years from 1st February 1909 to 31st January 1912, and that the plaintiffs had no right to eject the defendants from the tenement before the expiry of that period. We are equally clear that the only property let to the defendants was the ground floor of the house described variously as a square or oblong consisting of ten rooms and two verandahs, and that the defendants were not entitled to occupy either the vacant plot of

land on the north or the triangular area on the east marked M. N. P. on the plan.

They were no doubt entitled to a passage to the building, but this could have been easily secured without any interference with the two plots. As regards the verandah on the north, constructed in November 1910, it is true that it was not expressly included in the premises let to the defendants; but this omission was due to the obvious reason that it did not exist at the time the tenancy was created. It is however clear that the verandah could not be separated from the main building, and any attempt to let it to another tenant would have resulted in shutting up the rooms of the building on the northern side and in materially interfering with the proper enjoyment thereof. The verandah, when constructed, became an integral part of the building, and the defendants were, in our opinion, justified in occupying it.

A comparison of the pleadings in the previous suit leaves no doubt whatsoever that the defendants claiming both the plots of land as forming part of the premises leased to them not only brought them under their occupation but prevented the plaintiffs from making any use of them, *vide, inter alia*, the defendants' written statement, Paras. 1, 3 and 5 (p. 19 of the paper-book). This act of theirs, which was wholly unwarranted, prevented the plaintiffs from utilizing the property for *darbar* purposes. There can be little doubt that the plaintiffs could have easily let the plots either as building sites or after erecting shops thereon, and realized a handsome rent. There is a mass of evidence on the record that there was considerable demand for business premises in this part of the town, and that shops were fetching from ten to fifteen times their ordinary rent. The learned pleader for the respondents argues that the damages, if any caused to the plaintiffs, were not the direct consequence of his clients' act, as there is nothing to show that the Municipal Committee would have granted permission to build on the plots in question. We are unable to accede to this argument, which proceeds upon an assumption that the Municipal Committee would have refused an application for permission to build an assumption for which there is no foundation. It is clear that the defendants pre-



vented the plaintiffs from having access to these plots, and it would therefore have been a useless formality on the part of the latter to make such an application. As already observed, there was a great demand for business premises, and the evidence also shows that the shops and sites in the neighbourhood fetched very high rents. At the same time we consider that the amount of Rs. 8,000 claimed by the plaintiffs in respect of the plots is excessive. Upon the record there is some evidence to the effect that certain prospective tenants or their agents were prepared to pay fairly large sums of money for acquiring the lease of the sites or the buildings if constructed thereon, and though we are not inclined to accept these offers at their face value, we are not prepared to hold that they must all be characterised as bogus offers. The learned Divisional Judge was inclined to think that the verandah and the shed on the northern plot of land would have realized about Rs. 2,500 and we consider that Rs. 2,000 would probably be a fair estimate of the rent, which the plot alone would have fetched. As regards the triangular plot M. N. P. we would, in view of the evidence adduced by the plaintiffs, assess damages at the round figure of Rs. 1,000.

Upon our finding as to the period of the tenancy, it is clear that the defendants were entitled to occupy the ground floor of the house upto 31st January 1912, and for the period subsequent to that date they are liable to pay damages for the use and occupation, which in the case of a tenant holding over wilfully and contumaciously is usually assessed at double the ordinary rent: vide *Ganga Singh v. Musammatt Shib Devi* (2) and *Prihu Dial v. Ram Chand* (3). The learned Divisional Judge takes the 7th March 1912 as the date on which the premises were vacated: and in view of the plaintiffs' notice, dated 3rd February 1912, asking the defendants to quit the building, and of other evidence, we are inclined to concur in that view. Further, we agree with him that the fans and lamps removed by the defendants at the time of vacating the house were not the property of the plaintiffs. The result is that we grant the plaintiffs a decree for

	Rs.	as.	p.
(a) rent from 1st July 1911 to 31st January 1912 at Rupees 111-11-6 per mensem ...	782	0	6
(b) damages for the use and occupation of the ground floor of the house from 1st February 1912 to 7th March 1912 at Rs. 223-7-0 per mensem ...	274	0	0
(c) damages for the wrongful occupation of the two plots of land	—3,000	0	0
Total	—4,056	0	6

We accordingly accept the appeal, and modifying the decree of the lower Court direct that the defendants do pay to the plaintiffs the aforesaid sum. In the circumstances we leave the parties to bear their own costs throughout the litigation.

R.M./R.K.

*Appeal accepted.*

### A. I. R. 1919 Lahore 76

SCOTT-SMITH AND SHADI LAL, JJ.

*Secy. of State* — Defendant — Appellant.

v.

*Sohan Lal*—Plaintiff—Respondent.

First Appeal No. 1825 of 1914, Decided on 15th January 1918, from order of Divl. Judge, Delhi, D/- 26th May 1914.

Land Acquisition Act (1 of 1894), Ss. 9 and 25 (2)—Claim preferred after notice under S. 9—Court is competent to consider claims made before award—Costs of construction of building have to be considered for fixing market value.

In a suit for compensation for a house acquired by the Government it appeared that the notice issued by the Collector under S. 9 directed the persons interested to appear and state their objections on 20th July 1912. The plaintiff failed to appear on that date in spite of the fact that the notice was duly served upon him. Eventually he appeared on 21st August and filed written objections which were considered by the Collector who made his award. The plaintiff objected and a reference was made to the Court in accordance with law:

*Held:* (1) that the plaintiff could not be said to have omitted to make a claim pursuant to the notice given under S. 9 merely because he did not make it by the date originally fixed in the notice; (2) that at any time before giving his award the Collector had jurisdiction to deal with any claim made to him under S. 9 (2) of the Act: 12 C. W. N. 263, and 9 I. C. 423, *Dist.*; (3) that the cost of construction of the house could be taken into account in fixing its market value: 9 Bom. L. R. 1232, 3 I. C. 273; 22 W. R. 234, and 9 C. W. N. 655, *Dist.*; 9 Bom. L. R. 99, and 4 I. C. 278, *Foll.* [P 77 C 2]

*Government Advocate*—for Appellant.

*Moti Sagar*—for Respondent.

**Judgment.**—This is an appeal on behalf of the Secy. of State from an order of the Divisional Judge of Delhi award

(2) [1898] 33 P. R. 1898.

(3) [1904] 5 P. R. 1904.



ing Sohan Lal respondent Rs. 4,830 as compensation on a reference by the Collector under the Land Acquisition Act. The Court has enhanced the Collector's award by Rs. 1,061-7-2 and the appeal is that the order of the Court be set aside and the award of the Collector be confirmed. The first point urged by the learned Government Advocate on behalf of the appellant is that as the objector-respondent made no claim in pursuance of and in accordance with the notice issued under S. 9, Land Acquisition Act, therefore the Court had no jurisdiction in view of the provisions of S. 25 to increase the award. The notice issued by the Collector under S. 9 of the Act was for the appearance of persons interested and the stating of their objections etc., on 20th July 1912. The notice was duly served upon the objector-respondent, but he did not appear on the day fixed. The proceedings were adjourned and fresh notices were issued to certain persons who had not already been served. Eventually on 21st August Sohan Lal appeared and filed written objections in which he claimed Rs. 10,000 on account of compensation. The objections were considered by the Collector who in due course made his award. Sohan Lal objected to the award and a reference was made to the Court in accordance with law. Mr. Petman's argument is that Sohan Lal should have made his objections, if any on 20th July 1912 as the notice under S. 9 directed his appearance on that date and that he had no right to make any objections to the Collector at any later date. He bases his argument upon S. 25, sub-S. 2 of the Act which is as follows:

"When the applicant has refused to make such claim or has omitted without sufficient reason (to be allowed by the Judge) to make such claim the amount awarded by the Court shall in no case exceed the amount awarded by the Collector."

In support of his argument he has cited *Secy. of State v. Gobind Lal Bysak* (1) and *Secy. of State v. Bishun Dutt* (2), but in our opinion, those cases are distinguishable from the present one for there the objector never appeared at all before the Collector or made any claim prior to the award. No authority directly in support of his argument has been cited by the learned

Government Advocate and we do not think it can be said that Sohan Lal omitted to make a claim pursuant to the notice given under S. 9 merely because he did not make it by the date originally fixed in the notice. Proceedings before the Collector were adjourned from time to time and we consider that the claim made by Sohan Lal on 21st August was a claim pursuant to the notice given under S. 9. In our opinion at any time before giving his award the Collector had jurisdiction to deal with any claim made to him under S. 9 (2) of the Act. We consider therefore that the first objection raised on behalf of the appellant has no force.

The house for which compensation has been awarded to Sohan Lal was built by him upon land belonging to a Jain Temple and appears to have been of a quasi-religious character. It is therefore improbable that it could have been sold in the open market to any person who might desire to purchase it. But we see no reason why it should not have been sold to a member of the Jain community to which Sohan Lal himself belongs. As the house had never been rented and in the absence of evidence of sale of similar houses in the neighbourhood the Court in order to ascertain the market value inquired into the cost of construction of the building. The learned Government Advocate's second point is that the cost of construction should not have been taken into account in fixing the market value. In support of his argument he referred to *Land Acquisition Act, 1894, In re* (3), *Government of Bombay v. Karim Tar Mahomed* (4), *Collector of Hooghly v. Raj Kristo Mookerjee* (5) and *Secy. of State v. Kartic Chandra Ghose* (6). These rulings do not deal with cases of buildings. They lay down generally speaking that the amount of compensation is to be calculated on the actual value to the owner and that the costs of improving the land or of preserving it are not of much use in estimating this. There is nothing in any of these rulings to the effect that in no case can the cost of construction be taken into account in fixing the market value of a building. On the contrary in the case reported as *Government v. Dayal*

(3) [1907] 9 Bom. L. R. 1232.

(4) [1878-79] 33 Bom. 325=3 I. C. 273.

(5) [1874] 22 W. R. 234.

(6) [1905] 9 C. W. N. 655.

(1) [1903] 12 C. W. N. 263.

(2) [1911] 33 All. 376=9 I. C. 423.



*Mulji* (7) the actual cost of constructing buildings was taken into account by the Court and in *Sukhanand Gurumukhrai, In re* (8), it was held that where there is a demand the original cost of building is the most important element for consideration in fixing the market value. Something was said in argument before us about the re-instatement principle which is referred to in Lord Halsbury's laws of England, Vol. 6, p. 37, where we find the following:

"When the land is used for some particular purpose not of a commercial nature such as for a public park or for a church or school it is very difficult to estimate the loss. One method adopted is that known as re-instatement by which is meant that the amount of compensation to be awarded shall be assessed according to the cost of acquiring an equally convenient site and erecting equally convenient premises."

The learned Government Advocate urges that the re-instatement principle is not in force in India. In support of his argument he has referred to an unreported case of a Division Bench of this Court (Civil Appeal No. 12 of 1898 decided on 29th July 1898) which supports his contention. Without, however deciding whether the re-instatement principle is or is not in force in India, we are clearly of opinion that there is no authority for the proposition that the original cost of construction of a building can in no case be taken into consideration in assessing the market value thereof.

In the present case where there have been no sales in the neighbourhood and where the house in question has never been rented, we think that the best method of ascertaining the market value is to enquire into the original cost of construction. The Court below has assumed that there is a demand for such house property in the neighbourhood and we think it was justified in making this assumption. It points out that there are other houses of similar design in the neighbourhood and that this house is a large and well-constructed one, well fitted to hold the family of a Hindu gentleman. We see no reason to suppose that it could not have been sold to some other member of the Jain community. As to the cost of construction there is a good deal of evidence on the record. No less than three experts have made estimates. These have been discussed by the lower Court. The expert called by the objector estimates

the cost at some Rs. 6,000 whereas Mr. Croad, Assistant Engineer of Public Works Department, made an estimate for Rs. 3,600 only. The experts have criticised each other's estimates, and what the Court has done is to adopt a middle line. It thought Mr. Croad's criticism would bring Rai Babu Mal's estimate down say to Rs. 4,500, whereas Mr. Croad's own estimate appeared to it to be an optimistic one. Considering all the circumstances of the case and having regard to its own inspection of the spot it thought a fair award would be Rs. 4,200.

After a careful consideration we consider this estimate to be a reasonable one and we see no sufficient ground for differing from it. The appeal therefore fails and is dismissed, but considering that Sohan Lal made an exorbitant claim before the Collector and in the lower Court we leave the parties to bear their own costs.

R.M./R.K. *Appeal dismissed.*

### A. I. R 1919 Lahore 78

RATTIGAN, C. J.

*Kishan Dayal*—Appellant.

v.

*Rodu and others*—Respondents.

Second Appeal No. 803 of 1919, Decided on 17th July 1919, from the decree of Addl. Judge, Kangra, D/-20th January 1919.

(a) Mortgage — Construction — Mortgage deed drawn up by several joint owners—Refusal of one to execute—Mortgage intended to be one single indivisible transaction and hence conferred no rights on mortgagee.

Plaintiff sued for a declaratory decree to the effect that certain land was liable to attachment and sale in execution of his decree against the defendants. It appeared that the land was released from attachment on the objection of K.; who contended that it had been mortgaged to him. The mortgage deed was drawn up in favour of K and was to have been executed by three persons, who were joint owners in equal shares of the land in dispute. One of these three refused to execute it on the ground that it was without consideration.

*Held:* (1) that as the mortgage deed was not signed and executed by all three joint owners of the land, it was incomplete and conferred no rights whatever upon K; (2) that the mortgage was intended to be one single and indivisible transaction and could not be split up. [P 79 C 1, 2]

(b) Deed—Construction—Intention of parties is to be inferred from conduct.

The construction to be put on a particular transaction must depend upon the intention of the parties as inferred from their acts and conduct. [P 79 C 2]

*Badrud-Din Qureshi*—for Appellant.  
*Manohar Lal* for Jagan Nath—for Respondents.

(7) [1907] 9 Bom. L. R. 99.

(8) [1909] 24 Bom. 486=4 I. C. 278.



**Judgment.**—Plaintiffs sued for a declaratory decree to the effect that 4 kanals 3 marlas of land which had been released from attachment by order of the Court, dated 8th October 1917, were actually liable to attachment and sale in execution of his decree against defendants 1 to 3. It appears that after the land had been attached by the decree-holder, one Kishan Dayal, defendant 4, objected to the attachment on the ground that the land had been mortgaged to him by an unregistered deed, dated 25th November 1916 for Rs. 35. His objection was upheld, the property was released, and the decree-holder accordingly brought the present suit. It appears that the mortgage deed was drawn up in favour of Kishan Dayal and was to have been executed by Salo, Santu and Mt. Bahadri, who are joint owners in equal shares of the land in suit. The deed was duly signed and executed by Salo and Santu, but Mt. Bahadri refused to execute it on the ground that it was without consideration. The first Court held that the mortgage deed was incomplete and gave no rights to Kishan Dayal and that consequently plaintiffs were entitled to the decree prayed for. The Additional Judge on appeal upheld the order of the first Court and upon the same ground. He further held that the mortgage was not effected bona fide, that no mutation had taken place, and that even up to the date of suit Kishan Dayal had made no attempt to have mutation effected in his favour. He also points out that it has been proved that the land is still in the possession of defendants 1 to 3, though the mortgage was supposed to be with possession, and that it is defendants 1 to 3 who have been paying land revenue.

The defendant Kishan Dayal has appealed to this Court, and on his behalf it is contended that the mortgage was effectual if not against Mt. Bahadri, at all events to the extent of the shares of Salo and Santu. After hearing counsel on both sides I am of opinion that in the present case the mortgage was intended to be one indivisible transaction and that it cannot be split up in the manner desired by the appellant. It is further obvious that the mortgage was not a genuine transaction and that none of the parties to it intended that it should be acted upon. In cases of this kind the construction to be put on a particular transaction

must depend upon the intention of the parties as inferred from their acts and conduct, and in the present case, even if it can be assumed that the transaction was intended to be genuine there is nothing in the deed itself to show that the mortgage was not one single and indivisible transaction but in actual fact three separate and distinct mortgages effected by one instrument. The consideration was stated in a lump sum and there is no specification of the shares of the mortgagors. I hold therefore that unless and until the deed was signed and executed by all three joint owners of the land, it was, as found by the lower Courts, incomplete and conferred no rights whatever upon Kishan Dayal, defendant 4.

This appeal is accordingly dismissed with costs.

R.M./R.K.

*Appeal dismissed.*

### A. I. R. 1919 Lahore 79

SCOTT-SMITH AND BROADWAY, JJ.

*Sunder Singh*—Plaintiff—Appellant.

v.

*Dhian Singh and another*—Defendants—Respondents.

Second Appeal No. 1285 of 1914, Decided on 29th May 1918, from decree of Divl Judge, Gujranwala, D/- 26th February 1914.

(a) Court-fees Act (1870), S. 7 (v)—Suit for pre-emption of revenue paying land falls under S. 7 (v) — Punjab Pre-emption Act (1913), S. 29.

For the purposes of court-fees a suit for pre-emption in respect of a sale of land paying revenue falls under S. 7 (v), Court-fees Act. [P 80 C 1]

(b) Pre-emption — Suit for — Limitation—Validity of sale questioned and finally declared by Court—Limitation for suit in respect of sale runs from date of sale.

When the validity of a sale is questioned and is finally declared by a decree of Court, limitation for a suit in respect of the sale begins to run from the date of the sale, and not from the date of the decree declaring its validity.

[P 80 C 1]

*Gobind Ram*—for Appellant.

*Mehr Chand*—for Respondents.

**Judgment.**—The facts of this case are given in detail in *Dhian Singh v. Mt. Belas Kaur* (1) and need not be here recapitulated. The points for determination in this appeal are: (1) whether the court-fee stamp is sufficient? and (2) whether the suit is within limitation?

As to the first point, the suit is one for pre-emption. The sale attacked is

(1) [1912] 16 L. C. 127 = 12 P. R. 1912.



dated 19th March 1903 and was for Rs. 10,000. The subject-matter of the sale was land paying revenue and the court-fee paid on the plaint was Rupees 24-12-0 calculated on the revenue demand. The suit for purposes of court-fees falls under S. 7 (v), Court-fees Act, and the court-fee paid thereon has been correctly calculated. With regard to the second point, it was urged that inasmuch as subsequent to the sale of 19th March 1903, the validity of the sale had been disputed, time should not begin to run until after the decision reported as *Dhian Singh v. Mt. Belas Kaur* (1), where this Court held that the sale was a valid one, after which the vendee obtained possession. In our opinion, this contention is incorrect and no authority has been cited in support of it. The sale was effected on 19th March 1903 and must be regarded as valid from that date. The suit was filed on 2nd August 1913 and is therefore clearly time barred. The appeal is therefore dismissed with costs.

R.M./R.K. *Appeal dismissed.*

### A. I. R. 1919 Lahore 80

MARTINEAU, J.

*Mohar Singh and others*—Defendants—Appellants.

v.

*Mangal and others*—Plaintiffs—Respondents.

Second Appeal No. 2402 of 1918, Decided on 7th March 1919, from decree of Dist. Judge, Ambala, D/- 27th June 1918.

**Punjab Courts Act (1918), S. 41 (3)—Suit for possession on ground of failure of donee's title—Custom of reversion to donor not disputed—Certificate is not necessary.**

Plaintiffs sued for possession of certain land, alleging that their ancestor D. had made a gift of it to B, and that B. and his son having died without issue the land reverted to them as heirs of the donor. The first Court dismissed the suit but the District Judge on appeal decreed it. The defendants filed a second appeal to the Chief Court:

*Held:* (1) that as the appellants were not disputing the custom of reversion to the donor, but were appealing on the ground that there was no evidence in proof of the alleged gift, no certificate was necessary and the second appeal was competent; (2) that as there was no evidence to prove the alleged gift, the plaintiffs' suit was liable to be dismissed. [P 80 C 2]

*Sunder Das*—for Appellants.

*Moti Sagar*—for Respondents.

**Judgment.**—The plaintiffs sue for possession of land on the allegation that their ancestor Dewa Singh made a gift of

it to Bhagwana, and that the latter having died and his son having also died without issue the land reverts to them as the heirs of the donor. The first Court dismissed the suit, but the District Judge on appeal gave the plaintiffs a decree. The defendants have appealed to this Court. A preliminary objection has been taken that the appeal does not lie without a certificate from the District Judge, but this contention is wrong as the appellants are not disputing the custom of reversion to the donor, but are appealing on the ground that there is no evidence in proof of the alleged gift. The oral evidence does not prove that any gift was made by Deva Singh or any other ancestor of the plaintiffs, and the only evidence on which the learned District Judge finds the gift to be proved is a judgment of 1866 which he has not himself seen. The judgment in question was given in a suit brought by Deva Singh against Bhagwana for possession of 26½ bighas. The findings of the Court were that the land belonged to Deva Singh; that during his minority his mother got her brother, who was Bhagwana's father, to manage it; that when the settlement took place Bhagwana had the land recorded in his own name; and that he and Deva Singh had been jointly cultivating it. On these findings the Court gave Deva Singh a decree for half the land, leaving the other half for Bhagwana as he had been in possession. The land now in dispute is the half share which remained with Bhagwana in accordance with that decision.

It is clear from the above that Bhagwana did not get the land by gift. He came into possession as a manager, and the Court thought proper to allow him to retain half of the land, giving Deva Singh a decree for the other half. There being no evidence to prove the gift alleged by the plaintiffs, and the judgment of 1866 showing that no gift actually took place, the suit must fail. I accept the appeal, set aside the decree of the lower appellate Court, and restore the decree of the Munsif dismissing the suit. The respondents will pay the appellants' costs throughout.

R.M./R.K.

*Appeal accepted.*



**A. I. R. 1919 Lahore 81 (1)**

MARTINEAU, J.

*Kishen Chand*—Plaintiff—Appellant.

v.

*Municipal Committee, Lahore*—Defendant—Respondent.

Second Appeal No. 2551 of 1918, Decided on 5th March 1919, from decree of Dist. Judge, Lahore, D/- 4th June 1918.

*Punjab Municipal Act (3 of 1911), S. 169*—It is competent to close street for some traffic—Street leading to plaintiff's stables closed—Action is not harsh or oppressive—If servants' acts not repudiated, responsibility lies on Committee even in absence of resolution—Plaintiff's suit for injunction held untenable.

A Municipal Committee is entitled to close a street for a particular class of traffic. [P 81 C 1]

Plaintiff sued for an injunction for the removal of two iron rails put up by the employees of the Municipal Committee, Lahore, at the entrance to a blind alley which led to the plaintiff's stable and prevented the use of the way for horses and wheeled traffic.

*Held:* (1) that there was nothing harsh or oppressive in the Committee's action; (2) that inasmuch as the Committee had not repudiated the act of its servants, but had accepted responsibility for it, it must be taken to have ratified the act of its servants in spite of the fact that it had passed no formal resolution on this point; (3) that the plaintiff's suit was under the circumstances not maintainable. [P 81 C 1, 2]

*Anant Ram*—for Appellant.*Sheo Narain and Hari Chand*—for Respondent.

**Judgment.**—The employees of the Municipal Committee of Lahore put up two railings (or according to the lower appellate Court two pillars) at the entrance to a blind alley which leads to the plaintiff's stable, thus preventing the use of the way for horses and wheeled traffic. The plaintiff sues for an injunction for the removal of the railings or pillars. His suit has been dismissed, and he has filed a second appeal in this Court. Under S. 169, Municipal Act, the Committee has power to close a street permanently, and I agree with the lower appellate Court that a fortiori the Committee has power to close a street for a particular class of traffic. The learned District Judge has found that there has been nothing harsh or oppressive in the committee's action. It is contended for the appellant that as no resolution was passed by the committee for the railings or pillars to be put up, the plaintiff is entitled to have them removed. I do not agree with the contention. The committee has not repudiated the act of its servants, but has accepted the responsi-

bility for it. In *Secy. of State v. Kamachee Boye Sahaba* (1), where an act had been done by an agent of the Government in excess of his authority, it was held by the Privy Council that ratification of the act by the Government was equivalent to previous authorization. The same principle applies in the present case. The appellant's counsel urges that the matter never came up before the committee for ratification, but was only laid before a sub-committee, but I see no force in the argument. The facts that the appellant applied to the Secretary of the Committee and sent a notice to the President to remove the railings and that he finally brought the suit against the committee, show that he held the committee responsible for the act of its servants. I dismiss the appeal with costs.

R.M./R.K.

*Appeal dismissed.*

(1) [1857-59] 7 M. I. A. 476=4 W. R. 42 (P.C.).

**A. I. R. 1919 Lahore 81 (2)****Special Bench**

LEROSSIGNOL, BROADWAY AND

MARTINEAU, JJ.

*Lehna Mal Sadik*—Plaintiff—Petitioner.

v.

*Mt. Hakim Bibi and another*—Defendants—Respondents.

Matrimonial Case No. 3 of 1918, Decided on 15th November 1918, referred by Dist. Judge, Gurdaspur, D/- 19th April 1918.

*Divorce Act (4 of 1869), Ss 12, 14 and 17*—No decree can be passed merely because there is no opposition—Duty of Court explained.

A decree for dissolution of marriage cannot be legally granted merely on the ground that the respondent does not oppose the petition.

The Court must satisfy itself that there was good reason for the delay, if any has occurred, in suing; that there was no connivance and that there has been no condonation. [P 81 O2; P 82 C 1]

**Judgment.**—The petitioner is present in person, but the respondent and co-respondent have not been served. We see however no advantage in postponing the matter, for the District Judge's decree cannot be confirmed on the present record. A decree for dissolution of marriage cannot be legally granted merely on the ground that the respondent does not oppose the petition. The District Judge must satisfy himself that there was good reason for the delay in suing; that there was no connivance, and that



there has been no condonation. Not only has he failed to give any consideration to these matters, but he has not even examined the petitioner. We remand the proceedings to the Court below for disposal according to law.

R.M./R.K.

*Case remanded.*

### A. I. R. 1919 Lahore 82

SHADI LAL AND MARTINEAU, JJ.

*Nizam Al Haq and others*—Plaintiffs—Appellants.

v.

*Muhammad Ishak and others*—Defendants—Respondents.

First Appeal No. 2114 of 1915, Decided on 28th April 1919, from decree of Dist. Judge, Delhi, D/- 3rd May 1915.

Civil P. C. (1908), S. 92—Suit under S. 92 must be limited to matters included in sanction.

A suit brought under S. 92 must be limited to matters included in the sanction and it is not competent to the Court to enlarge the scope of the suit and to grant reliefs other than those included in the terms of the sanction: 89 P. R. 1901, *Foll.* [P 82 C 2]

*Moti Sagar*—for Appellant.

*D. C. Ralli* for *Fazl-i-Hussian*—for Respondents.

**Judgment.**—This was an action brought by three persons interested in the maintenance of a graveyard of the Punjabi Mohamedans situate in Shidipur, a suburb of Delhi. The reliefs for which the plaintiffs prayed were the removal of the trustee, Muhammad Ishaq, the appointment of one or more new trustees, the vesting of the property in the new trustee or trustees, the settling of a scheme, and the rendition of accounts by the present trustee. The action was directed mainly against Muhammad Ishaq, who was according to the plaintiffs managing the trust property, and had been guilty of breach of the trust. The case was clearly one coming within the purview of S. 92, Civil P. C., and the allegations made by the plaintiffs in their application for obtaining the consent in writing of the Collector and other circumstances of the case make it absolutely clear that the trust is one of a public nature; and indeed no suggestion was ever made in the trial Court that it was a private trust. The Collector, while granting sanction for the bringing of a suit for the other reliefs claimed by the plaintiffs, declined to give his consent to a suit for an account. Now, there can be no doubt, and indeed it is admitted by Mr. Moti Sagar for the

plaintiffs, that the suit must be limited to matters included in the sanction, and that it is not competent to the Court to enlarge the scope of the suit and to grant reliefs other than those included in the terms of the sanction: vide, *inter alia*, *Prem Singh v. Labh Singh* (1). The District Judge has therefore rightly dismissed that portion of the suit which related to the rendition of accounts.

Coming now to the reliefs covered by the sanction, we find that the learned Judge after disposing of the preliminary issues on 13th January 1915 adjourned the case "for framing of other issues." On 10th February 1915 Muhammad Ishaq with two other defendants however made an application stating that they were not in possession of the graveyard and that one Muhammad Shafi was in possession thereof: and they accordingly prayed that as against them the suit be dismissed in toto. The learned Judge, instead of framing issues on the pleadings of the parties, and recording such evidence as they wanted to produce held that as the defendants had withdrawn from the management and disclaimed personal interest in the matter:

"the only step now remaining is to call a meeting of the Punjabi Mohamedan community and ascertain the wishes of the members as a whole as to a scheme of management for the future and the appointment of trustees, if necessary."

Accordingly after ascertaining the wishes of the Punjabi Mohamedans he appointed a committee of three trustees including Muhammad Ishaq; and directed that one of them should retire annually, and that a successor should be appointed at a meeting to be convened for the purpose. Now, Mr. Moti Sagar for the plaintiffs contends that Muhammad Ishaq retired only temporarily from the management of the trust in order to stifle an inquiry into the allegation that he had been guilty of mismanagement and was unfit to be a trustee; and that he really intended to come back again as soon as he had succeeded in successfully shutting out all inquiry into his management of the trust property. The learned vakil consequently contends that the District Judge has erroneously deprived his clients of an opportunity of satisfying the Court that Muhammad Ishaq was wholly unfit to discharge the duties of a trustee. After hearing arguments on both sides we are of opinion that the plaintiffs' com-

(1) [1901] 89 P. R. 1901.



plaint is fully justified, and that the District Judge should have framed issues arising in the case and allowed the parties to produce their evidence. It seems to us that the so-called retirement of Muhammad Ishaq was a mere device in order to evade an inquiry into his conduct as a trustee, as is clear from the fact that he got himself elected as a trustee again and, that his counsel, when questioned by us was not prepared to say that his client would not hereafter seek election as a trustee. The District Judge should not have accepted the seemingly plausible excuse put forward by Muhammad Isaq to put an end to the investigation demanded by the plaintiffs. It is clear that there has been no proper trial of the case; and we must therefore accept the appeal and setting aside the decree of the lower Court remit the case for re-decision with reference to the foregoing remarks. The court-fee on the memorandum of appeal shall be refunded, and other costs shall abide the event.

R.M./R.K. *Appeal accepted.*

### A. I. R. 1919 Lahore 83 (1)

RATTIGAN, C. J.

*Ahmad and others*—Defendants — Appellants.

v.

*Sundar Singh* — Plaintiff — Respondent.

Second Appeal No. 2121 of 1918, Decided on 18th December 1918.

**Custom (Punjab)—Shamlat—Cosharer can claim partition if shamlat land is cultivated but no injunction against cultivation can be granted.**

Where a cosharer cultivates a part of the common land, the other cosharers can apply for partition but are not entitled to an injunction restraining the cosharer from cultivating the land. The fact that a fair is held on the land every year when the land is free from crops and that it is reserved for camps of officers on tour does not affect the matter. [P 83 C 2]

*Mukand Lal Puri*—for Appellants.

*Nanak Chand*—for Respondent.

**Judgment.** — Plaintiff, one of many proprietors, sued for a perpetual injunction to restrain defendant 1 from cultivating or building on a plot of 4 bighas 2 kanals of land, on the allegation that the land was shamlat and had been used as a camping ground for officers on tour and for the purposes of an annual fair which took place in the month of Sawan. Defendant pleaded that he, as one of the proprietors, was entitled to cultivate

part of the shamlat and had actually done so in respect of this plot for some 20 years. The first Court found as a fact that defendant had for many years been cultivating the plot in question and that though it had been used for the purpose of the fair at a time of the year when land was free from cultivation, there was nothing peculiar in the facts of the case to deprive the defendant of the ordinary right which a proprietor has of cultivating shamlat. The Court accordingly, after discussing the facts in a well-considered judgment, dismissed the suit. The District Judge, on appeal, reversed the order of the lower Court mainly on the ground that the revenue authorities contemplated excluding this particular plot from partition and reserving it as a place for the holding of the annual fair. He accordingly granted plaintiff a perpetual injunction restraining defendant from cultivating or building on the site in dispute, but directed that his decree should be contingent on the revenue authorities finally reserving the land from partition as necessary for the purposes of the said fair.

It appears to me after hearing arguments that this was not a proper case in which to grant an injunction. Defendant has not built on the land, and I am informed, has no intention of doing so and his cultivation of it (such as it has been) has in no way prevented the land from being used for the purposes of the fair. No new circumstance has been proved which would justify the Court in issuing an injunction of the kind asked for and the plaintiff's proper remedy is obviously to apply for a partition. I accordingly accept the appeal with costs throughout and dismiss the suit.

R.M./R.K. *Appeal accepted.*

### A. I. R. 1919 Lahore 83 (2)

SCOTT-SMITH, J.

*Mt. Malakunnisa* — Defendant — Petitioner.

v.

*Mt. Piari*—Plaintiff—Opposite Party.  
Civil Revn. Petn. No. 697 of 1918,  
Decided on 11th January 1919.

**Limitation Act (1908), Art. 61 — Suit by guardian for money spent for minor — Art. 61 applies — Cause of action arises when money is spent and not on termination of guardianship.**

Plaintiff sued for recovery of money alleged to have been spent by her on the marriage of her



ward, the defendant. It appeared that the marriage took place 9 years before suit:

*Held*: that plaintiff's cause of action arose at the time of the marriage and not on termination of the guardianship and that the suit was barred by time under Art. 61, Sch. 1, Limitation Act.

[P 84 C1]

*Manohar Lal*—for Petitioner.

*Abdul Rashid*—for Respondent.

**Judgment.**—This was a claim for Rs. 422 out of Rs. 900 said to have been spent by Mt. Piari, plaintiff-respondent, on the marriage of her ward Mt. Malakunnisa.

The Judge, Small Cause Court, decreed the claim and defendant applies for revision on the ground that the suit is barred by time. The marriage took place 9 years before suit and it is contended that Art. 61, Sch. 1, Lim. Act, is applicable. The lower Court apparently thought that time ran from 4th April 1917, on which date another case was decided between Mt. Gauhar Nisa, a sister of defendant, and present plaintiff. In that case Mr. Clifford held that Rs. 900 had been spent on present defendant's marriage, but even if that finding is relevant it is not the present plaintiff's cause of action.

I am informed that her guardianship came to an end on 31st December 1912 and yet she waited for 4½ years thereafter before she brought the present suit. It is urged that up till 31st December 1912 she was recouping herself from the income of her ward's estate for sums expended by her and that if her guardianship had continued she would have repaid herself all she had spent. That may be, but I cannot agree with respondent's counsel that a cause of action accrued to her on the termination of her guardianship. It is finally urged by respondent's counsel that substantial justice has been done, and that therefore this Court should not interfere in revision. I am however by no means satisfied of the justice of the plaintiff's claim. I think if she had had a good claim she would have brought it long ago. I allow the revision, and setting aside the lower Court's order dismiss plaintiff's suit, but in view of Mr. Clifford's decision which doubtless led plaintiff to suppose she had a just claim, I leave parties to bear their own costs in both Courts.

R.M./R.K.

*Petition allowed.*

## A. I. R. 1919 Lahore 84

CHEVIS, J.

*Ram Rattan and another*—Defendants  
—Appellants.

v.

*Labhu Ram and another*—Plaintiffs  
—Respondents.

Second Appeal No. 2741 of 1918, Decided on 4th March 1919, from decree of Dist. Judge, Jullundur, D/- 6th May 1918.

(a) Practice—Pleadings—Plaintiff must succeed on his own pleadings—Claim may be decreed when admitted, but if denied and allegations not proved claim must be dismissed.

A plaintiff must succeed on his own allegations.

A plaintiff who fails to prove his full claim may well be allowed so much of that claim as is admitted by the defendant. But where the defendant totally denies the claim and the plaintiff fails to prove the allegations on which the claim is based, then his suit should be dismissed. [P 85 C1, 2]

(b) Mortgage—Mortgage-deed alleged to be allotted to plaintiff's share—Allegation not proved as documents were inadmissible—No joint decree can be passed and suit should be dismissed.

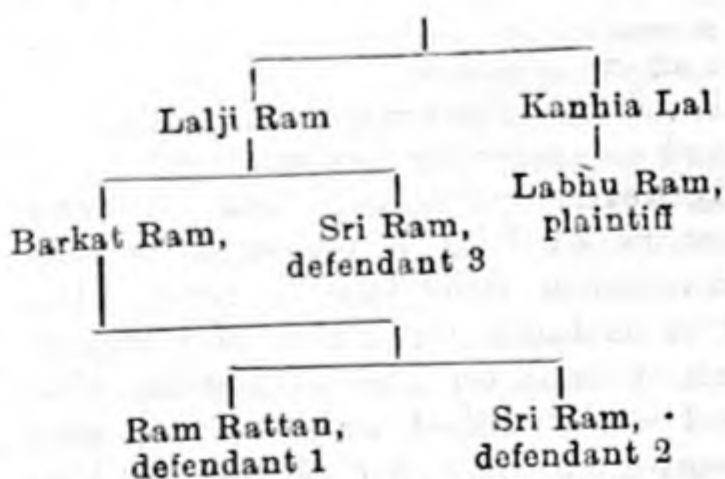
Plaintiff sued to recover possession of certain property on the allegation that it was mortgaged to one B, father of defendants 1 and 2, and brother of defendant 3, as manager of the joint Hindu family and that on partition it fell to the share of the plaintiff who took possession, but who had since been dispossessed. The property was held to be joint family property and the plaintiff could not prove his sole possession as the documents on which he relied were held to be inadmissible in evidence:

*Held*: that the plaintiff could not be given a decree for joint possession on the ground that the mortgagee rights belonged to the whole family and that his suit was therefore liable to be dismissed. [P 85 C 2]

*Manohar Lal*—for Appellants.

*Badr-ud-Din Kureshi*—for Respondent.

**Judgment.**—The genealogical tree is:



The subject of the suit is some land which was mortgaged to Barkat Ram. According to plaintiff Barkat Ram took it in mortgage as manager of the joint



Hindu family, and on the family partition, which took place in 1906, the land in suit fell to plaintiff's share and he took possession, but has since been dispossessed. According to defendants 1 and 2 their father acquired it as a separate acquisition and it was never a part of the joint property, but belongs to them alone. The lower Courts have held that Barkat Ram took the land in mortgage as manager of the joint family, but that the documents on which plaintiff relies to prove that this land fell to his share in partition are inadmissible in evidence, and so he cannot get the decree for exclusive possession which he seeks. The first Court held that plaintiff would be entitled to a half share in the land in a suit for partition of the whole joint family property, but that the whole must be brought into the hotchpot and that plaintiff could not claim a share of this bit of property only. The learned District Judge held that plaintiff could get a decree for joint possession as the mortgagee rights belong to the whole family, and so gave plaintiff a decree for joint possession. Ram Rattan and Sri Ram appeal. The first ground of appeal is that plaintiff's appeal to the District Judge was time barred. That I should say would depend on whether plaintiff is right in saying that he can claim to deduct the period spent in getting copy of decree as well as the period spent in getting copy of judgment. Ordinarily I think a man should apply for both copies at the same time.

The other point is that plaintiff is not entitled to a decree for joint possession, and this plea is, I think correct. A decree for joint possession can rest only on the ground that there has been no partition, whereas plaintiff himself alleges that there has been a partition and that this land fell to him in partition. It is true that plaintiff is unable to prove these allegations, and so his suit for sole possession fails. But does it necessarily follow that there has been no partition? I do not think so. The mere fact that plaintiff has failed to prove the alleged partition because the evidence on which he relies is inadmissible, does not prove that the land is joint. A plaintiff should succeed on his own allegations. Neither side in this case has alleged that the land is joint, and when plaintiff fails to prove his

own allegations of full ownership arising out of an alleged partition, I do not see why he should be allowed to turn round and take joint possession on the ground of a joint ownership neither alleged by himself nor admitted by the other side. If Ram Rattan and Sri Ram had denied the partition, but admitted that plaintiff was entitled to a share as joint owner, then the case would have been different. A plaintiff who fails to prove his full claim may well be allowed so much of that claim as is admitted by the defendants. But where the defendants totally deny the claim and the plaintiff fails to prove the allegations on which his claim is based, then I think his suit should be dismissed. I accept this appeal, and reversing the decision of the learned District Judge I restore the decision of the first Court dismissing the suit. But bearing in mind that the lower Courts are agreed that Barkat Ram acquired the land as manager of the family, and that plaintiff's suit fails merely because certain documents have not been registered. I leave the parties to bear their own costs in all Courts.

R.M./R.K.

*Appeal accepted.*

### \* A. I. R. 1919 Lahore 85

SHADI LAL AND WILBERFORCE, JJ.

*Panna Lal Lachhman Das*—Defendant—Appellant.

v.

*Hargopal Khubi Ram* — Plaintiff — Respondent.

Second Appeal No. 834 of 1915, Decided on 31st May 1918, from decree of Dist. Judge, Delhi, D/. 26th February 1915.

(a) Negotiable Instruments Act (26 of 1881), Ss. 7 and 1—According to S. 7 acceptance must be in writing but S. 1 provides for oral acceptance when mercantile usage is proved.

The definition of the word "acceptor" as contained in S. 7, Negotiable Instruments Act, leaves no doubt that an acceptance must be in writing, but, having regard to the provisions of S. 1 of the Act, so far as regards instruments in an oriental language, a mercantile usage may be proved which makes an acceptance by word of mouth as effectual against the drawee as an acceptance in writing. [P 87 O 1]

(b) Negotiable Instruments Act (26 of 1881), S. 48—Assignment without endorsement does not confer rights of holder in due course—Assignment can be oral.

An endorsement is not the only mode by which a negotiable instrument may be transferred. It may be assigned otherwise, and the assignee can sue in his own name, the only difference



being that an assignee has only the right, title and interest of the assignor, while an endorsee has all the rights of a holder in due course.

[P 86 C 2]

An assignment need not necessarily be in writing and may be oral.

[P 86 C 2]

(c) *Negotiable Instruments Act* (26 of 1881), S. 48—Endorsee not claiming interest adverse to real owner—Latter can sue—Oral assignment can be presumed.

Where it was found that the plaintiff was the real beneficiary under a hundi to whom the money was to be ultimately paid, that he was the holder of the hundi and that the nominal endorsee did not claim any interest adverse to him :

*Held*: that it must be presumed that there was an oral assignment of the hundi in favour of the plaintiff and that he had a right to sue upon it.

[P 86 C 2]

*Sheo Narain and Sohan Lal* — for Appellant.

*Manohar Lal and Cooper*—for Respondent.

**Judgment.** — This was an action brought by the firm of Hargopal-Khubi Ram against the firm of Panna Lal-Lachhman Das for the recovery of a certain sum of money on the basis of a hundi. The hundi was drawn upon the defendant firm by Mathra Das-Sada Nand of Bombay in favour of Jaswant Rai and Company, who sent it to the firm of Mangal Sain Kundan Lal of Delhi with an endorsement, the meaning of which is a matter in controversy between the parties.

The bill was presented to the drawees, who on 7th July 1913 marked it as seen, and on 23rd July paid Rs. 3,100 out of Rs. 6,000, the amount due thereon. On or about the 25th July the defendants discovered that the firm of the drawers had become insolvent, and they consequently declined to pay the balance, with the result that the plaintiffs brought the present action for the recovery of the remaining amount due on the instrument. The Courts below have concurred in decreeing the claim, and the first point raised on appeal preferred by the defendants is that the plaintiffs, Hargopal-Khubi Ram, are neither the endorsees nor the assignees of the hundi and that consequently they are not entitled to maintain the suit. Now, we have considered the terms of the endorsement, and find that not only the firm of Mangal Sain-Kundan Lal but also that Hargopal-Khubi Ram figure therein. It is difficult to ascertain the exact meaning of the language used by the endorser; but one thing is absolutely clear, and that is that

the plaintiffs, if they were not the actual endorsees, were certainly the persons on whose behalf Mangal Sain-Kundan Lal were to realize the money due on the instrument.

Now, it is conceded by the learned advocate for the appellants that an endorsement is the not only mode by which a negotiable instrument may be transferred. It may be otherwise assigned, and the assignee may sue in his own name; the only difference being that the assignee will have only the right, title and interest of the assignor, while the endorsee will have all the rights of a holder in due course: vide, *inter alia*, *Muthar Sahib Maraikar v. Kadir Sahib Maraikar* (1). The learned advocate for the appellants further admits that an assignment need not necessarily be in writing and may be an oral one. Now, considering that the plaintiffs were undoubtedly the beneficiaries to whom the money was to be ultimately paid, that they are the holders of the instrument, and that Mangal Sain-Kundan Lal do not claim any interest adverse to them, we are of the opinion that the plaintiffs have succeeded in establishing their contention that the hundi was assigned to them. Indeed, as pointed out by the learned District Judge, the plaintiffs' right to sue as holders was not challenged in the Court of first instance; and there can be no doubt that if the defendants had questioned their locus standi, the plaintiffs could have conclusively proved an oral assignment in their favour by producing a member of the firm of Mangal Sain-Kundan Lal as a witness to depose to that effect. It is beyond question that one of the two firms was entitled to sue, and considering that Mangal Sain-Kundan Lal never asserted their own title, we concur in the conclusion of the lower appellate Court that the plaintiffs' locus standi to maintain the suit has been established.

The only other matter, which has been urged before us and which requires determination, is whether the drawees, who have not signed their assent on the bill, can be charged with liability thereon. The Courts below have found on the evidence adduced by the plaintiffs that the drawees orally accepted the bill, and the question is whether an oral acceptance has the effect of making the drawees

(1) (1905) 28 Mad. 544.



liable. Now, the definition of the word "acceptor" as contained in S. 7, Negotiable Instruments Act, leaves no doubt that the acceptance must be in writing, but S. 1 of the Act prescribes that nothing contained therein shall affect any local usage relating to any instrument in an oriental language. The plaintiffs contend that there is a mercantile usage at Delhi which makes an acceptance by word of mouth as effectual as an acceptance in writing, so far as the liability of the drawee is concerned. In this connexion our attention has been invited to the evidence of three witnesses produced by the plaintiff, and also to that of the defendant's witness Kishori Lal. The learned counsel for the plaintiffs has placed his special reliance on the conduct of the defendants in making part payment on the hundi in question which they had accepted only orally. Having regard to the fact that the usage relied upon by the plaintiffs is a matter of considerable importance to the mercantile community of Delhi, we consider it necessary that further inquiry into the question should be made in order to enable us to come to a satisfactory conclusion.

Accordingly we direct the Court of first instance to record further evidence upon the question whether there is a mercantile usage at Delhi which renders a drawee, who has accepted a hundi orally, liable on the instrument, and to certify the evidence to this Court. It is necessary that instances of payments by drawees in pursuance of oral acceptance should be examined, and both the parties afforded an opportunity to adduce their evidence on the issue. The Subordinate Judge is directed to return to this Court the evidence with his finding thereon through the District Judge, who should also express his opinion upon the existence or otherwise of the usage.

R.M./R.K.

*Case remanded.***A. I. R. 1919 Lahore 87 (1)**

SCOTT-SMITH, J.

*Bhana and others — Petitioners.*

v.

*Emperor — Prosecutor — Opposite Party.*

Criminal Revn. Petn. No. 1146 of 1918, Decided on 29th November 1918, from order of Dist. Magistrate, Karnal, D/- 2nd September 1918.

Punjab Restriction of Habitual Offenders Act (1918), S. 7 — Orders under S. 7 cannot be made against person against whom order has been made under Criminal P. C., (1898), S. 118.

An order of restriction under S. 7, Restriction of Habitual Offenders Act (Punjab), cannot be made against a person against whom an order has been made under S. 118, Criminal P. C.

[P 87 C 2]

*Nihal Chand—*for Petitioners.

**Judgment.**—The petitioners as habitual offenders have been ordered to execute bonds under S. 118, Criminal P. C., and orders have also been passed restricting their movements under the provisions of Punjab Act 5 of 1918. This latter order is contrary to the provisions of S. 7 of the Act, which lays down in the proviso that an order of restriction shall not be made against any person against whom an order is made under S. 118, Criminal P. C. I therefore allow the revision so far as to set aside the order of the restriction against all the petitioners.

R.M./R.K.

*Petition allowed.***A. I. R. 1919 Lahore 87 (2)**

CHEVIS, J.

*Thakar Das—*Decree-holder — Appellant.

v.

*Sham Das and another —* Judgment-debtors—Respondents.

Misc. Second Appeal No. 1819 of 1916, Decided on 4th January 1919, from order of Dist. Judge, Amritsar, D/- 10th March 1916.

Contract Act (9 of 1872), S. 128—Liability of surety—Surety bond should be construed strictly — Liability should not be beyond extent contracted, illustrated.

Suretyship must be construed strictly, and a surety cannot be held liable beyond the extent to which he has contracted. [P 88 C 2]

Respondents stood sureties for the judgment-debtors till decision of an appeal in the Divisional Judge's Court. On the decision of the appeal the case went back to the trial Court and the decree-holders wanted to arrest the judgment-debtors. The respondents agreed to extend their suretyship till the "date fixed." Then followed an order by the Court, saying "parties want to compromise, time allowed up to 2nd January 1914." This was followed by a further order: "if judgment-debtors want to be made insolvents they can have up to 19th January 1914." The judgment-debtors appealed to the Chief Court which sent for the records, and there was no hearing on either 2nd or 19th January. The Chief Court having rejected the appeal the case went back to the first Court, and the judgment-debtors having absconded, the decree-holders sought to realize the decree from the sureties:



*Held*: that the statement of the sureties showed that they undertook nothing more than to produce the judgment-debtors on the date fixed for the next hearing, i. e., 19th January 1914, and therefore they were not liable for the non-production of the judgment-debtors at a date nearly 2 years later. [P 88 C 2]

*Bevan Petman and Balmokand* — for Appellant.

*Moti Sagar and Bhagat Ram Anand* — for Respondents.

**Judgment.**—Tirath Ram and Banshi Dhar stood sureties for the judgment-debtors till decision of appeal in the Divisional Judge's Court. That appeal having been decided, the case came back to the Subordinate Judge, Lala Achhru Ram. The decree-holder wanted to arrest the judgment-debtors. Tirath Ram and Banshi Dhar agreed to extend their suretyship till the "date fixed," which I take to mean the next date of hearing to be fixed on that date. Then followed an order, saying "parties want to compromise, time allowed up to 2nd January 1914," but this was followed up by a further order, "if judgment-debtors want to be made insolvents they can have up to 19th January 1914." This was on 16th December 1913. The judgment-debtors then appealed to the Chief Court and the files were sent for by this Court. Apparently there was no hearing either on 2nd or 19th January in the lower Court. There is an order, dated 16th January 1914, initialled apparently by S. Umrao Singh, District Judge, saying: "Files have gone to Chief Court, execution stayed." (The Subordinate Judge, Lala Achhru Ram, had left Amritsar on transfer on 10th January 1914, and his cases were apparently sent to the District Judge).

The Chief Court having rejected the appeal, the case went back to the first Court, and then the judgment-debtors having absconded, the decree-holders sought to realize the decree from the sureties. The first Court and the District Judge having held that the sureties are not liable, the decree-holders appeal to this Court. Whether the sureties had the judgment-debtors ready to appear in Court on 19th January 1914 is disputed. The sureties have put in an affidavit to this effect, but seeing that the sureties' first defence was that their liability ended in the Divisional Judge's Court, I very much doubt the affidavit. The probabilities are that both sureties and judg-

ment-debtors knew that the Chief Court had called for the records and that there would be no hearing on 19th January 1914, and so they did not trouble to attend the Court. But granting that they did not produce them on 19th January 1914, the question still remains whether their liability extended beyond that date. Suretyships must be construed strictly, and a surety cannot be held liable beyond the extent to which he has contracted. What did the sureties mean by binding themselves to produce the judgment-debtors on the "date fixed"? I think it may well be argued on their behalf that they merely meant the next date of hearing which the Court was about to fix.

I do not think they contemplated a far distant date. As it happened, the date fixed was not the actual date of the next hearing. The next actual hearing was on 16th December 1915, when the files had come back from the Chief Court, nearly two years later than the date fixed by the Subordinate Judge, in December 1913. Looking at the actual undertaking of the sureties as recorded by the Subordinate Judge, I am unable to hold that the sureties undertook more than to produce the judgment-debtors on the date which the Court was about to fix at the time when the sureties made their statement. That date was 19th January 1914. There was no hearing on that date, and I do not think the sureties can be held liable for non-production of the judgment-debtors on a date on which there was no hearing. And I do not think that they can be held liable for non-production of the judgment-debtors at a date nearly two years later, because all that they bound themselves to do was to produce the judgment-debtors at the date fixed for the next hearing, i. e., 19th January 1914. The decision of the lower Courts seems to me correct, and I dismiss the appeal, but I pass no order as to costs in this Court as I think it is a hard case for the decree-holders.

R.M./R K. *Appeal dismissed.*

**A. I. R. 1919 Lahore 88**

SHADI LAL AND WILBERFORCE, JJ.  
*Partap Singh*—Appellant.

v.

*Mt. Jai Kaur*—Respondent.

Second Appeal No. 1485 of 1915, Decided on 20th July 1918.



Custom (Punjab) — Succession — Hindu  
Jats of Ludhiana—Widowed mother succeeds  
to son in preference to his step-brother.

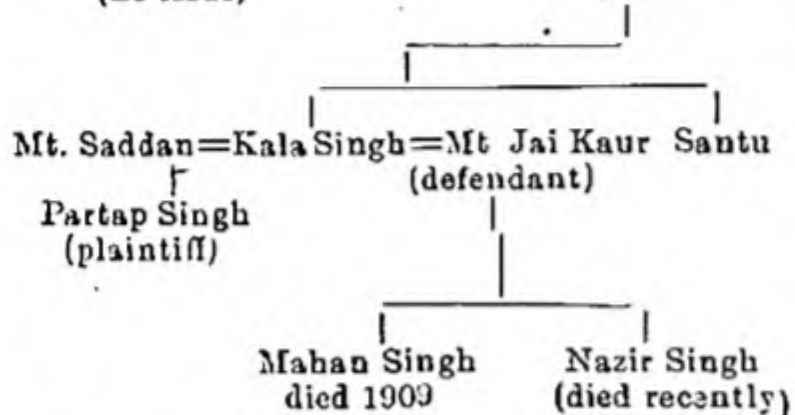
Among Hindu Jats of the Ludhiana District a widowed mother is entitled to succeed to the estate of her childless son in the presence of a step-brother. [P 89 C 2]

*Nand Lal*—for Appellant.

*Ganpat Rai*—for Respondent.

**Judgment.**—The pedigree-table of the parties is as follows:

Mt. Sukho=LAKHA SINGH=Second  
(no issue) wife



The parties are Jat Sikhs of the Ludhiana District. The dispute before us is regarding the succession to the property of Nazir Singh, the last surviving son of Kala Singh, and the defendant Mt. Jai Kaur. The property on the death of Kala Singh was mutated in the names of his sons and on the death of Nazir Singh his share has been mutated in the name of his mother. The lower appellate Court has held that both by general custom and the custom of the District Mt. Jai Kaur, mother of Nazir Singh, is entitled to a life tenure of the property. A certificate as to the question of custom involved has been obtained. The lower appellate Court has based its decision especially on the Riwajiams of Mr. Gordon-Walker and Mr. Dunnett. It has also held that para. 22 of Rattigan's Digest is in favour of the mother. It has also referred to a case which occurred in the family on the death of Lakha Singh who was succeeded in equal shares by a childless widow, Mt. Sukho, and the sons by his other wife. Further, it has referred to certain authorities that on the death of Nazir Singh, the succession must be considered as re-opened and that Mt. Jai Kaur was then entitled to succeed as the widow of Kala Singh.

On appeal before us, it was argued that para. 22 of Rattigan's Digest gives a misleading summary of the authorities on which it purports to be based. It is pointed out by counsel that these authorities refer to the rights of a mother as against collaterals or a sister and not as

against a son of a co wife. This criticism appears to be justified, and the only Chief Court judgment on the rights of a widowed mother as against a son of a co-wife is contained in an unreported authority No. 341 of 1880 referred to in Rattigan's Digest and also by the lower appellate Court. This authority however being of Mcghuls of the Rawalpindi District, does not help us in the present case. Fortunately however it is not necessary for us to base our decision on any general custom of the Punjab, as the Riwajiams of the district deal with the matter at length. Both Mr. Gordon-Walker and Mr. Dunnett deal clearly with the question. There can be no doubt as to the meaning of the answers recorded by them, as in both cases the rights of a mother as against a brother are specially dealt with. It is true that these Riwajiams contain no specific instances of the custom alleged: but answers to other questions on the matter of succession leave no doubt that these entries contain a correct exposition of the custom. The rights of a widowed mother rank very high in the district, as is shown by the answers to questions 32 and 39, which are both supported by many instances. In answer to question 32 it is stated that a sonless widow in the presence of sons by another wife takes a share equal to that of each of the sons. In answer to question 39 it is stated that a widowed wife and widowed mother succeed in equal shares. Thus, a widowed mother is given a very favourable position, being equal to that of a widowed wife.

No actual instances were proved before the lower Courts, except two which have occurred in the family of the parties. To the succession of Lakha Singh by a childless widow and his sons we have already referred. The other instance which is relied upon by the appellant is that on the death of Mahan Singh, the brother of Nazir Singh, his property was divided equally between his own brother, Nazir Singh, and his half brother, Partab Singh. At the time however in the presence of her son Mt. Jai Kaur had no right of succession and she is in no way adversely affected by this instance. To sum up therefore we find that among Hindu Jats of the Ludhiana District a widowed mother is entitled to succeed to the estate of her childless son in the



presence of a son by another wife. We dismiss the appeal with costs.

R.M./R.K. *Appeal dismissed.*

### A. I. R. 1919 Lahore 90 (1)

SCOTT-SMITH AND MARTINEAU, JJ.

*C. G. Varcados*—Plaintiff—Appellant.  
v.

*D. C. McLeod and others*—Defendants  
—Respondents.

Second Appeal No. 2580 of 1915, Decided on 23rd July 1918, from order of Dist. Judge, Lahore, D/- 12th June 1915.

(a) Limitation Act (9 of 1908), Art. 40—Art. 40 applies to suit for infringement of trade mark.

The period of limitation applicable to a suit for damages for infringing a trade name or a trade mark—a trade name or mark being an exclusive privilege—is contained in Art. 40, Sch. 1, Lim. Act. [P 90 C 2]

(b) Specific Relief Act (1 of 1877), S. 56 (h)—Plaintiff not taking any action for more than 5 years beyond serving notice for infringement of trade mark—No injunction can be granted.

In a suit for an injunction to restrain the defendant from using a trade name and from infringing the plaintiff's trade mark, it appeared that the plaintiff had taken no action beyond sending a notice to the defendant and that he had stood by for five years before coming forward with a suit:

*Held:* that, in the circumstances, the plaintiff was not entitled to the injunction, vide S. 56 (h), Specific Relief Act. [P 90 C 2]

*Obedulla*—for Appellant.

*Gokul Chand Narang and Madan Gopal*—for Respondents.

**Judgment.**—The plaintiff founded a business of cigarette makers at Aden in 1901. His brother G. G. Varcados (defendant 2) joined him as a partner in 1906, but left the partnership in 1908, and in 1909 started a business in Lahore under the name of G. G. Varcados and Co. or Varcados and Co. He carried this on at first in partnership with D. A. Braganza, and from 1911 in partnership with defendant 1. The plaintiff sues (a) for an injunction to restrain defendants from using the name G. G. Varcados and Co. or Varcados and Co., which he alleges to be his own trade name, and from infringing his trade mark, (b) for an order for the delivery to him of the cigarettes, labels, etc., in the defendants' possession, and (c) for damages or an account of the profits.

The first Court dismissed the suit, holding that the claim for damages or an account of the profits was barred under Art. 40, Sch. 1, Lim. Act, and that

under S. 56 (h), Specific Relief Act, the plaintiff was not entitled to an injunction as he had acquiesced in the defendants carrying on the business in Lahore. On appeal the District Judge agreed with the finding of the first Court in regard to the claim for an injunction, but with regard to the claim for damages held that though Art. 40 applied, the claim was within time, as a fresh cause of action arose *de die in diem* so long as the infringement of the trade mark continued. He therefore remanded the case under O. 41, R. 23, Civil P. C. The plaintiff has preferred a second appeal to this Court. It is argued on his behalf that the claim for damages is governed by Art. 115 or Art. 120; and that therefore the period for which damages can be claimed is six years. We do not agree with the contention. The right to a trade name or a trade mark is an exclusive privilege, and a suit for damages for infringing the privilege clearly falls under Art. 40. The only other question involved in the appeal is whether there has been acquiescence on the plaintiff's part disentitling him to an injunction under S. 56 (h), Specific Relief Act. It has been shown that he has known since 1909 of the existence of the defendants' business in Lahore. He took no action in the matter beyond sending a notice (Ex. D-1) to defendant 2 on 24th March 1909 and issuing a caution to customers (D. W. 1). He has stood by and allowed defendant 1 to invest considerable sums of money in the business, and it was only in June 1914, when the business had begun to show signs of prosperity, that he came forward with the present suit. The lower Courts are clearly right in holding that the plaintiff is, in such circumstances, not entitled to an injunction. The appeal is dismissed with costs.

R.M./R.K. *Appeal dismissed.*

### A. I. R. 1919 Lahore 90 (2)

SHADI LAL, J.

*Bhagat Singh*—Plaintiff—Appellant.  
v.

*Mt. Santi*—Defendant — Respondent.

Second Appeal No. 1051 of 1918, Decided on 16th November 1918.

(a) Hindu Law — Marriage — Remarriage of pregnant widow immediately after husband's death is not prohibited — Custom (Punjab), marriage.

There is no rule either in the Punjab Customary law or in the Hindu law prohibiting the



remarriage of a pregnant Hindu widow immediately after her husband's death. [P 91 C 1]

(b) Hindu Law—Marriage — Cohabitation is not essential.

Cohabitation is not essential to validate a marriage. [P 91 C 1]

*Lal Chand Mehra*—for Appellant.

*B. A. Cooper*—for Respondent.

**Judgment.** — The learned District Judge, without adjudicating upon the question of the remarriage of Mt. Santi with Bhagat Singh, has dismissed the plaintiff's suit on the ground that :

"the remarriage of a pregnant widow immediately after her first husband's death and immediately before her confinement"

is "opposed to equity and good conscience and public morality." Now it is true that according to Mahomedan law a widow is not allowed to remarry before the expiry of the period of iddat, but no such rule is to be found either in the Customary law or in the Hindu law. Nor is there any provision in the English law prohibiting a remarriage of a pregnant widow immediately after her first husband's death. It is perfectly obvious that ordinarily a widow does not remarry immediately after her husband's death, more especially when she is pregnant; but if she does marry, I do not understand why the marriage should be declared to be invalid. The learned Judge has not referred to any authority in support of his view, and Mr. Cooper for the respondent has expressed his inability to cite any law having a bearing upon the subject. There can be little doubt that the remarriage of a pregnant widow immediately before her confinement cannot be followed by cohabitation, but cohabitation is not essential to validate the marriage. I have given my best consideration to the question, and I am not prepared to hold that the remarriage is invalid on the ground mentioned by the learned District Judge. Accordingly I accept the appeal, and reversing the decree of the lower appellate Court, remit the case for decision on the remaining issues. The court-fee on the memorandum of appeal shall be refunded, and other costs shall be costs in the cause.

R.M./R.K.

*Appeal accepted.*

## A. I. R. 1919 Lahore 91

BROADWAY, J.

*Ali Muhammad* — Defendant — Petitioner.

v.

*Manohar Lal and others*—Plaintiffs—Opposite Parties.

Civil Revn. Petn. No. 392 of 1917, Decided on 21st November 1918, against decree of Sub-Judge, First Class, Multan, D/- 15th January 1917.

Punjab Courts Act (1918), S. 44 — Terms of document definite—Court misconstruing them commits irregularity.

Where the terms of a document under consideration are definite, a Court in misconstruing them commits an irregularity which renders a revision competent, [P 92 C 1]

*Hargopal*—for Petitioner.

*Tirath Ram*—for Respondents.

**Judgment.**—The suit out of which this petition for revision has arisen was instituted by Rai Sahib Ram Chand of Multan against Ali Muhammad, son of Pir Bakhsh, and a sum of Rs. 8 was claimed from the defendant on account of the price of the produce of a date tree for a period of two years which the defendant was alleged to have taken. The plaintiff claimed that he was the owner of the date tree in question, which is admittedly growing in the courtyard or ahata of the house in which the defendant lives. It was averred that in 1892 the plaintiff's father had purchased this tree along with others from Imam Bakhsh and Allah Ditta and had ever since been taking the produce thereof. The defendant is the son-in-law of Imam Bakhsh. The Courts below held that the plaintiff's claim was correct and that the tree had been sold under the deed of 1892 and that ever since the said sale the plaintiff's predecessors-in-title and the plaintiff had been enjoying the fruits thereof. The entries in the revenue papers support the contention of the plaintiff, for it appears that the date-trees in the village were owned by Raizada Ram Chand's family one-fourth share, Ghulam Rasul and others half share, and Imam Bakhsh and Allah Ditta one-fourth share. Subsequent to 1892 the entries are to the effect that Raizada Ram Chand owned half-share in the date-trees and Ghulam Rasul the other half-share. This entry appears to have continued up to 1910 when a partition took place between Raizada Ram Chand and Ghulam Rasul, and the date-trees were divided between



them. Inasmuch as Imam Bakhsh and Allah Ditta were not parties to this partition it is obvious that they are in no way bound by it.

In revision it has been contended by Lala Hargopal that the Courts below have wholly misconstrued the deed of sale under which the tree in suit was never sold. Lala Tirath Ram, for the respondents, has contended that the said tree passed under the deed of sale and that in any event if the deed was ambiguous, the Courts below have rightly considered it in the light of the subsequent conduct of the parties. Mr. Tirath Ram also urged that this Court ought not to interfere on the revision side in a case of this nature inasmuch as no material irregularity had been shown. It seems to me however that if the document under consideration is definite, a Court in misconstruing it commits an irregularity which renders a revision competent. In admitting this petition to a hearing the late Shah Din, J., considered this document and was of opinion that the tree had not passed under the deed of sale which was not ambiguous. Counsel on both sides have read the deed of sale in Court and I have also considered it with great care. It commences by reciting the fact that the vendors sell their one-fourth share in the shamilat land as detailed in the said deed. Then follows a minute description of all the lands conveyed, giving their khatauni and khasra numbers; after which all the vendor's right, title and interest in the said lands are conveyed including their one-fourth share in the date-trees growing on the lands detailed. Further down, it is also specifically stated that the vendors' rights in the shamilat land detailed in the said deed were conveyed; then follows a reservation of the particular number on which this tree stands.

This particular number is not entered in the details and it is perfectly clear that it was never intended to be conveyed. Lala Tirath Ram however contended that the trees thereon passed under the general conveyance of all date-trees and that the fact that the land was excepted from the sale without any mention of the tree indicated that the tree was intended to be sold and was sold. In this contention I am however unable to agree, for the trees sold are stated to be the trees growing on the lands de-

tailed, and it is common ground that this particular plot of land was omitted from the detailed lands that were being sold. It follows therefore that under this deed the tree in suit of which the produce is sought to be recovered, was never sold, and indeed the fact referred to by the learned Subordinate Judge, that Imam Bakhsh contested the entry according to mutation, Ex. P-4, indicates that the vendors never intended to sell this tree. This is further strengthened by the fact that this particular tree is growing within the four walls of Imam Bakhsh's courtyard. There appears to me to be no ambiguity whatever in the deed and therefore the Courts below have acted wrongly in placing a construction on it in the light of subsequent events which the actual words of the deed itself do not warrant. In these circumstances I accept this petition and dismiss the plaintiff's suit with costs throughout.

R M./R.K. *Petition accepted.*

### A. I. R. 1919 Lahore 92

LEROSSIGNOL, J.

*Bola*—Appellant.

v.

*Bhikha and others*—Respondents.

Second Appeal No. 652 of 1918, Decided on 16th May 1918.

**Pre-emption — Suit for — Defendant assignee of vendee—Plaintiff cannot plead that he waived his right to pre-empt on original sale.**

A plaintiff in a pre-emption suit cannot plead with success against a defendant who is the assignee of the original vendee that he waived his right to pre-emption the original sale. [P 92 O 2]

Defendant who had a prior right of pre-emption in respect of a sale waived his right to pre-empt, but when the vendee's possession was threatened by the plaintiff the vendee sold the land by private treaty to the defendant;

*Held*: that the defendant had waived a right to enforce pre-emption and not a right to resist it, and that therefore the plaintiff could not succeed against him. [P 92 O 2]

*Zia-ud Din*—for Appellant.

*Bakhshi Tek Chand*—for Respondents.

**Judgment.**—The only question in this case is whether it can be pleaded with success against a defendant who is the assignee of the original vendee that he waived his right to pre-empt on the original sale.

In this case Barkat did waive his right to pre-empt, but when the vendee's possession was threatened by plaintiff, vendee sold the land by private treaty to Barkat. I have been referred to



several rulings which lay down that a waiver of a right to pre-empt is irrevocable, and that it opens the door to every other pre-emptor, also that a pre-emptor plaintiff who has waived his right cannot succeed in his suit, but these rulings are inapplicable to this case, where the waiver does not seek to enforce a right to pre-empt. He is not a plaintiff but a defendant, who has secured the land by private treaty and defends his acquisition on the ground that his right to pre-empt is as good as if not superior to plaintiff's. What Barkat waived was a right to enforce pre-emption, not a right to resist it. I dismiss the appeal but leave parties to bear their own costs in this Court.

R.M./R.K.

*Appeal dismissed.***A. I. R. 1919 Lahore 93 (1)**

CHEVIS AND SHADI LAL, JJ.

*Sultan Ali and others—Defendants—Appellants.*

v.

*Amir and others—Plaintiffs—Respondents.*

Misc. Second Appeal No. 1859 of 1914, Decided on 9th May 1917, from order of Addl. Divl. Judge, Attock, D/- 16th June 1914.

Civil P. C. (5 of 1908), S. 100—Whether conveyance included pro rata share in shamilat is question of fact—No question of construction of deed arises.

The question whether the parties to a sale deed intended the sale to include a pro rata share of the shamilat is one of fact and not of law, and where the document does not present any difficulty, no question of the construction of the instrument arises in the case. [P 93 O 1, 2]

*Gokal Chand Narang—for Appellants.*

*Nanak Chand—for Respondents.*

**Judgment.**—The Courts below have concurred in holding that the ancestor of the defendant Mian Muhammad did not, by virtue of the sale deed dated 25th November 1870, acquire a right to a proportionate share in the shamilat of the village. This finding has been arrived at after full consideration of all the evidence including the terms of the document, and there can be no doubt that the question whether the parties to the transaction intended the sale to include a pro rata share of the shamilat is one of fact and not of law, *vide*, *inter alia*, *Saleh v. Mt. Pakhtawar* (1). The language of the document does not present any difficulty, and we are not prepared to hold

that any question of the construction of the instrument arises in this case. It is however argued that in 1870 there was no shamilat in the village, that a very large area about 2,67,000 kanals was subsequently awarded by the Government and recorded as shamilat deh, and that all the persons who were then proprietors in the estate became ipso facto cosharers in this joint holding. This matter was not specifically raised in the pleadings, and the issues appear to be couched in ambiguous terms. There can however be no manner of doubt that the defendant invited the attention of the trial Court to it by an application presented by him on 29th July 1910, and that the Court in pursuance of the prayer contained therein summoned the Naib Salar Kanungo and examined him in respect of the entries made at the Settlements of 1854, 1860 and 1878 as to the existence and the extent of the shamilat area. Further ground No. 4 of the memorandum of appeal to the lower appellate Court refers to the same point, but the learned Additional Divisional Judge did not apparently appreciate the point and omitted to deal with it.

We have heard counsel on both sides, and while holding that the defendant did not acquire any title to a share in the shamilat under the instrument of sale we consider that the question, whether there was any subsequent acquisition of the shamilat area and whether the defendant is entitled to a pro rata share therein, one of some importance, especially when we find that the entry of the Settlement of 1878 lends colour to the contention of the appellants. We are however unable to express any definite opinion and direct the Court of first instance to frame an issue on the point and determine it along with the other issues remanded for decision. The appeal is accepted pro tanto and the parties are directed to pay their own costs in this Court.

R.M./R.K.

*Appeal accepted.***A. I. R. 1919 Lahore 93 (2)**

MARTINEAU, J.

*Khuda Yar and another—Appellants.*

v.

*Ahmad and another—Respondents.*

Second Appeal No. 514 of 1918, Decided on 10th June 1918, from decree of Dist. Judge, Shahpur, D/- 8-1-1918,

(1) [1917] 8 P. R. 1917=86 I. O. 601.



**Custom (Punjab)—Succession—Kaliar Jats of Kaliaranwala — Full brothers exclude half brothers.**

Among Kaliar Jats of Manza Kaliaranwala, Tahsil and District Mianwali in succession among brothers, half-brothers are excluded by full brothers. [P 95 C 1]

*Nank Chand*—for Appellants.

*C. L. Gulati*—for Respondents.

**Judgment.**—The parties are Kaliar Jats of Kaliaranwala village in the Mianwali tahsil and District. Their relationship is shown in the pedigree table given in the judgments of the lower Courts. Ahmad Yar's widow Sabhrai has died and the dispute relates to the succession to his share in Khatas Nos. 1013 and 1014, which descended from his father Gheba. The question for determination is whether Ahmad Yar's half brothers are entitled to succeed equally with his full brothers (who are the plaintiffs) or are excluded by them. The first Court gave the plaintiffs a decree but the lower appellate Court has accepted the defendants' appeal and dismissed the suit finding that the defendants have proved that in their family the rule of succession among brothers is that whole and half-brothers succeed equally. I do not find any proof that this is the rule of succession in the family of the parties. On the contrary the only instance of succession among brothers in this family is in favour of the plaintiffs. It occurred in 1914, when on the death of Sabhrai her share in two other khatas which had descended from Gheba, namely, Khatas Nos. 1009 and 1011 was mutated in the names of the plaintiffs alone.

The learned District Judge has given his decision in favour of the defendants on the strength of the fact that when Gheba died about seven years ago Khatas Nos. 1009 and 1011 were mutated in the names of his sons according to the pagwand rule. From this fact he draws the presumption that half brothers succeed equally with full brothers.

It is no doubt stated in para. 26 of Rattigan's Digest of Customary law that when the property of the common ancestor was distributed according to the rule of pagwand the Court may presume that the whole blood and half blood succeed together but it is also stated that where the brothers of the whole blood subsequently form separate groups and so regulate the succession amongst themselves as to alter the original rule of distri-

bution the presumption will cease to operate. Now we find that in the mutation of Khatas Nos. 1009 and 1011 on Gheba's death 2/6ths were entered in the names of defendants 3/6ths in the names of plaintiffs and Sabhrai and 1/6th in the name of plaintiffs' mother Mehran. This suggests that the defendants were regarded as forming a group separate from their half-brothers and when the fact is further taken into consideration that the defendants have by the mutation effected after Sabhrai's death been so far excluded by the plaintiffs from a share in Khatas Nos. 1009 and 1011, I think that the fact of Gheba's property having been distributed among his sons according to the pagwand rule does not justify the presumption that in the family of the parties in succession among brothers the half blood succeeds with the whole blood. A reference to Pandit Hari Kishna Kauls' Customary law of the Mainwali District 1908, would also show that the proposition laid down in Rattigan's Digest as to the presumption to be drawn from the prevalence of the pagwand rule of succession among sons does not apply in the Mainwali District. The pagwand rule appears to prevail universally throughout the district but there is nevertheless no general rule that half-brothers succeed along with full brothers.

The important question in this case is on which side the onus lies. The learned District Judge is of opinion that the Munsif was right in placing the onus on the defendants and I agree with him. In the *Riwajiam* of 1878 it is stated that among Pathans the whole blood excludes the half blood and that Jats follow the Pathan custom. In the Customary law of the Mianwali District of 1908 it is stated that among Jats, full brothers and half brothers succeed equally but that several instances have been quoted amongst them in which full brothers have succeeded to the exclusion of half brothers and on p. 7 of the introduction it is said that:

"the Jats though maintaining the reverse appear to have followed the rule of full brothers excluding the half-brothers."

I gather from this that the custom as it was stated to exist in 1878, had not been changed in 1908. The Jats in 1908 were apparently in favour of the custom being changed but no change had actually



taken place and the old rule by which full brothers excluded half-brothers was still observed in practice. Questions of inheritance have to be decided in accordance with the custom as it exists and not in accordance with views that may be entertained as to what it ought to be. It is therefore for the defendants to prove that they are entitled to succeed with the plaintiffs to Ahmad Yar's estate. They have been able to produce evidence of only two instances of half-brothers succeeding along with full brothers among Jats. These two instances which are mentioned by the witnesses Hayat and Khadullah are insufficient to discharge the onus. The plaintiffs' witnesses give instances among Pathans of full brothers excluding half-brothers and say that Jats follow the same custom. This is in accordance with the entry in the Riwajiam of 1878. Further there are three instances of exclusion of half-brothers among Jats mentioned in the current Riwajiam which counterbalance the instances mentioned by the defendants' witnesses.

The lower appellate Court mentions a Munsif's judgment of 1909 which was in favour of the rights of half brothers but against this there are two judgments referred to by the lower appellate Court, one given by Mr. Kennaway and the other by his predecessor Khan Bahadur Abdul Ghafur Khan in which the Riwajiam of 1878 was followed. My conclusion is that the defendants on whom the onus lies have failed to prove the existence either of a family custom or of a tribal custom by which in succession among brothers those of the half blood succeed equally with those of the full blood. I accordingly accept the appeal set aside the decree of the lower appellate Court and restore that of the first Court. The respondents will pay the appellants' costs throughout.

R.M./R.K.

*Appeal accepted.***A. I. R. 1919 Lahore 95**

BROADWAY, J.

*Kanji Mal*—Judgment-debtor—Appellant.

v.

*Kidar Nath*—Decree-holder—Respdt.  
Misc. First Appeal No. 2391 of 1919,  
Decided on 14th February 1919, from  
decree of Senior Sub-Judge, Gurgaon, D/-  
13th August 1918.

Civil P. C. (1908), O. 21, Rr. 11 and 17—Application for execution signed by *N* describing himself as khas Mukhtar of *G* son of decree-holder—Special power of attorney filed—*G* found to be decree-holder's attorney and Court directed that *G* should be described as such—Application refiled after necessary amendments—Mere fact that *G*'s power of attorney was not filed did not render application void—Omission to state whether any money was realized or whether any execution was sought was not material—Amendment rightly allowed—O. 21, R. 17 (2) saved limitations.

Plaintiff obtained a money-decree against defendants from the Calcutta High Court and after various attempts at realization, had the decree transferred to Gurgaon, where an application was filed on behalf of the decree-holder for execution of the said decree. The application was signed by one *N*, who described himself as "mukhtar khas" of *G*, son of the decree-holder and the special power of attorney in *N*'s favour was filed along with the application. Having found that *G* was the decree-holder's attorney, the executing Court directed that *G* should be described in the application as such and returned the application, which was re-filed after necessary amendments:

*Held*: (1) that the mere fact that *G*'s power-of-attorney was not filed with the application did not render it void; (2) that the failure to give notice to the judgment-debtor had no bearing on the validity or the legality of the application itself; (3) that the omission to mention such particulars as whether any money had been realized or any settlement arrived at, or whether any previous execution had been sought out, was not material and could not possibly have prejudiced the judgment-debtor; (4) that the Court was acting within its powers in directing the amendment of the application and (5) that sub-Cl. (2), R. 17, O. 21, Civil P. C., saved limitation.

[P 96 O 1, 2]

*Oertel and Cooper*—for Appellant.*Gokal Chand Narang*—for Respondent.

**Judgment.**—On 11th June 1906 one Kidar Nath obtained a decree against Kanji Mal and others from the High Court at Calcutta for Rs. 11,000 odd and costs. After various attempts at realizing the sum decreed Kidar Nath finally had the decree transferred to Gurgaon in May 1918, and on 31st May 1918 an application was filed on behalf of the decree-holder, in the Court of the Senior Subordinate Judge, for execution of the said decree. This application was signed by one Nathu Mal describing himself as a "Mukhtar Khas" of Gajanand, son of Kidar Nath, and the special power of attorney in Nathu Mal's favour was filed with the application. Kanji Mal raised objections to execution of the decree, alleging: (1) that the application had been made by Gajanand whereas the decree-



holder was Kidar Nath ; (2) that as notice was not issued the whole proceedings were void ; (3) that the application did not comply with the provisions of O. 21, R. 11 (b), Civil P. C. The executing Court held that as Gajanand was Kidar Nath's attorney, the application was really in order and directed that Gajanand should be described in the application as Kidar Nath's attorney. Further that the failure on the part of the Court, to record its reasons for not issuing notice did not vitiate the proceedings, and that the application could be amended so as to bring it into conformity with the provisions of O. 21, R. 11 (b), Civil P. C.

Accordingly on 6th August 1918 the application was returned for the necessary amendments and was re-filed on 12th August 1918 duly amended. Kanji Mal then contended that the execution of the decree was barred by limitation as Art. 182 and not Art. 183, Lim. Act, was applicable. This objection having been disallowed, Kanji Mal preferred this appeal to this Court and I have heard Mr. Oertel on his behalf while Mr. Gokal Chand Narang has addressed me for the decree-holder. Mr. Oertel has conceded that the article applicable is 183, but he contended that inasmuch as the application of 31st May 1918 was defective the decree could not now be executed. Mr. Oertel based a good deal of his arguments on a mistaken impression of the actual facts. He contended that Gajanand had been made an attorney for the firm of Kidar Nath, etc., and not for Kidar Nath himself, whereas the decree is in the name of Kidar Nath alone. As a matter of fact the power of attorney shows that Gajanand was appointed attorney to Kidar Nath in his own name as well as in the name of the firm. The mere fact that Gajanand's power of attorney was not filed with the application cannot, in my opinion, render the application void. So far as this objection is concerned, I have no hesitation in holding that as it has been proved that Gajanand was the recognized agent of Kidar Nath the application made by his special attorney Nathu Mal was in order. As to the failure to give notice I fail to see how that has any bearing on the validity or legality of the application itself.

As to the defects in the application itself the Court was apparently acting in

accordance with O. 21, R. 17, Civil P. C., in directing its amendment. The defects in question were the omission to mention (1) whether or not an appeal had been filed against the decree ; (2) whether any money had been realized or any settlement arrived at ; and (3) whether any previous executions had been applied for and if so, when and with what results. It is not necessary to discuss the various rulings cited by the learned counsel on both sides as, in my opinion, the omission to mention these particulars was not material and could not possibly have prejudiced Kanji Mal. The Court below was acting within its powers in directing the amendment and sub-CI. (2), R. 17, O. 21, saves limitation. I accordingly dismiss this appeal with costs.

R.M./R.K. *Appeal dismissed.*

### A. I. R. 1919 Lahore 96

CHEVIS AND ABDUL RAOOF, JJ.

*Udham Singh and another*—Plaintiffs—Appellants.

v.

*Gurdip Singh*—Defendant — Respdt.

First Appeal No. 1663 of 1915, Decided on 20th January 1919, from decree of Sub-Judge, 1st Class, Lyallpur, D/- 6th April 1915.

Civil P. C. (1908), O. 32 R. 3 (1) and (2) — Suit against minor—No order of appointment of guardian ad litem—Minor effectively represented—Decree passed in suit is binding on minor.

Where there has been no formal order of appointment the Court must look carefully into the proceedings, and the decree can be held to be binding on the minor only if it appears that the case was properly conducted on his behalf. If in a suit a guardian, though not formally appointed by the Court, has been recognized as acting on behalf of a minor and has not been guilty of any negligence but has done all that can be done on behalf of the minor—in other words, if the minor has been effectively represented—the decree is binding on the minor and he cannot get it set aside merely on the ground of noncompliance with the provisions of O. 32, R. 3 (1) and (2). Where therefore in a suit for setting aside a decree against a minor it appeared that although there was no formal order of appointment of a guardian the minor was properly represented throughout the trial and that there was no negligence on the part of the guardian who did all that she could to protect the interests of the minor:

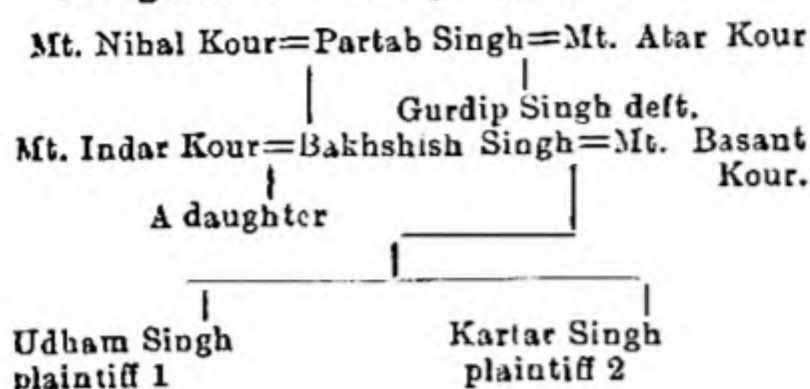
*Held:* that the decree was binding on the minor and could not be set aside. [P 99 C 2]

*Muhammad Shafi and Devi Ditta Mal*—for Appellants.

*Sheo Narain and Jinda Ram* — for Respondent.



**Judgment.**—The genealogical tree is:



Kartar Singh has now died sonless and is represented by his widow. The facts are as follows: In 1893 a grant of 15 squares of land on the Chenab canal was made. The grant was in the name of Bakhshish Singh, who paid in the nazrana and signed the register of tenants. He died on 3rd June 1899, and mutation was effected in favour of his father Partab Singh who took possession. Partab Singh died in 1901, leaving a will by which half the land was to go to Udham Singh and Kartar Singh, sons of Bakhshish Singh, and half to his own son Gurdip Singh. These were all minors at the time. On Partab Singh's death Mt. Basant Kour took possession on behalf of her sons. Gurdip Singh sued for half of the land, claiming that Partab Singh was the owner and the real grantee and relying on the will. In the plaint the defendants, Udham Singh and Kartar Singh, were described as "minors under the guardianship of Mt. Basant Kour," but there was no application for formal order of appointment of guardian, and no affidavit in support of any such application, and no formal order of appointment was made throughout the case (see Ss. 443 and 456, old Civil P. C., corresponding to O. 32, R. 3, of the present Code). An ex parte decree was passed on 24th January 1908, but on 19th February 1903 an application signed by Mt. Basant Kour was put in through her general agent and a pleader, and the decree was set aside. On 28th July 1904 the District Judge granted Gurdip Singh a decree; the defendants appealed unsuccessfully first to the Divisional Judge, and next to the Chief Court. An application for review was also presented to this Court but was rejected. Udham Singh and Kartar Singh, on attaining majority, brought the present suit, alleging negligence of their guardian in the former suit, and seeking to set the former decree aside.

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Their suit has been dismissed, the Subordinate Judge holding that the guardian was not guilty of any negligence, and that the omission to pass a formal order of appointment of guardian is in the circumstances a mere irregularity. The plaintiffs appeal to this Court.

A good deal of argument has been addressed to us on the effect of the above omission, but we think it unnecessary to discuss this point at length. There seems to us ample authority for holding that if the guardian, though not formally appointed by the Court, has been recognized as acting on behalf of the minor, and has not been guilty of any negligence but has done all that can be done on behalf of the minor—in other words, if the minor has been effectively represented—the decree is binding on the minor, and he cannot set it aside by a fresh suit merely on the ground of non-compliance with Ss. 443 and 456. Even when a guardian has been formally appointed a quondam minor can of course, in some cases get the decree set aside, e. g., he may prove fraud or collusion. But if there has been no formal order of appointment then we must look carefully into the proceedings, and only in case we are able to find that the case was properly conducted on behalf of the minor can we hold that the decree is binding on him in spite of the absence of a formal order of appointment of guardian. In order to come to such a finding we must go carefully into the proceedings in the former suit, but we cannot admit that this means that we should sit as a Court of Appeal to decide whether the decision in the former suit is correct on the merits. In fact if this were so we should have the Subordinate Judge, who has decided the present suit, sitting as a Court of appeal from the Chief Court, which passed the final order in the previous suit.

We now proceed to examine whether the present plaintiffs were, as the learned Subordinate Judge has found, properly represented in the former suit. As the Subordinate Judge points out, leading local pleaders were engaged in the first Court and in the Divisional Court, and Mr. Brown, a well-known barrister was engaged in this Court. Even when two witnesses were examined on commission at Amritsar a local pleader was engaged. It is true that he did not cross-examine the witnesses, but this is not necessary



because (as Mr. Shafi urges) he was not properly instructed; it may well be that on hearing the evidence given he could not discover any questions the answers to which would be likely to benefit his clients. It is not always the ablest counsel who spends the most time in cross-examination of a witness.

Mr. Shafi contends that the case was inefficiently conducted throughout. In the first place he urges that the proper pleas were not put in, and that it should have been urged on behalf of his clients: (1) that Crown grants must be read according to their tenor (see Act 15 of 1895, S. 3) and that as the grant was in the name of Bakhshish Singh it could not be held that anyone else was the grantee, (2) that the rules framed under Act 3 of 1893 provide for the register of tenants being signed by the grantee, and that as it was Bakhshish Singh who signed the register no one else could possibly be regarded as the tenant, and that as the term "tenant" includes the tenant's successors Bakhshish Singh's sons were the only persons to succeed, and (3) that an application by Partab Singh for mutation of a part of the 15 squares in his own favour in Bakhshish Singh's lifetime having been rejected by the Financial Commissioner, this rejection was a legal bar to any further claim on the part of Partab Singh or of any one claiming under Pratap Singh.

But it was expressly denied on behalf of the minors that Partab Singh was the grantee, and it seems to us that all these three matters could have been argued in support of the denial and that there was no need to put arguments in the pleadings. The real question was who was the grantee and this question, rightly or wrongly, having been decided in Gurdip Singh's favour he obtained a decree. There was no question as to who should succeed Bakhshish Singh; the question was whether Bakhshish Singh or Partab Singh was the grantee. As to the Financial Commissioner's rejection of Partab Singh's application this might be a piece of evidence, but we fail entirely to see how it would be conclusive.

Then it is urged that evidence, both documentary and oral, which should have been produced at the former trial, and which has been produced at this trial, was not put in in the former trial. The Colony file relating to the grant was sent for, and copies of important documents were

made by the Court before the file was returned; so the whole of that file was in evidence. A bahi of the late Bakhshish Singh has now been put in, relating to the income from the 15 squares, also khasrah girdawari papers to show the harvests on the squares, and papers (dakhilas) to show that Bakhshish Singh obtained treasury receipts for the payments of nazrana. We fail however to see how these advance the case; the grant being in Bakhshish Singh's name the receipts for the nazrana would, of course, be also in his name, and as to the bahi and khasrah girdawari papers it is admitted that he was in possession of the 15 squares and managing them (whether as owner or on his father's behalf) until his death. Then certain papers are put in to show that he was lambardar and part owner of a village bearing his name in the Multan District, and also managing some land on behalf of his uncle, and it is said that this would have shown that the Courts were wrong in thinking that he had no private funds from which he could pay in the nazrana.

But it is not suggested that he embezzled the profits of his uncle's land; his uncle Bur Singh (p. 327) says Bakhshish Singh gave him the produce, though he submitted no written accounts. As to the other land in Multan we do not suppose the production of documents relating to them would have made the least difference to the former case, the decision in which was based mainly on the ground that the grant was made in consideration of Partab Singh's services, and was really a grant to him and not to his son. It is true that the District Judge says: "the defendants did not, and I believe could not, produce the least evidence to prove that Bakhshish Singh had any separate purse and paid this large amount out of his pocket." Seeing however, that Bakhshish Singh's name was shown as tenant of the squares and was admittedly in possession and managing the squares, Mt. Basant Kour and her advisers may well have thought that it was useless to produce evidence as to the Multan land (if they ever thought at all about this evidence); if the Courts were going to hold that Bakhshish Singh was merely his father's agent as regards the squares, they might easily have taken the same view as regards the Multan land. In fact



we are told that the Multan land is also the subject of litigation at the present time. As to the oral evidence which has now been put in, we fail to see that it proves anything worth proving. If the fact of Bakhshish Singh having signed the tenants' register and of the grant having been made in his name and of his being in possession till his death is not sufficient to prove that he, and not his father, was the real grantee, the oral evidence is of no avail. The story told by Mt. Basant Kour and Bhagat Ram of some papers in a box may be true, but we do not see what difference their production would have made to the case, and so we cannot see that their non-production was owing to any negligence. Bhagat Ram, who was Mt. Basant Kour's general agent, talks of the original *jawab dawa* having been left behind and of his having to get a new one written at half an hour's notice, but he is evidently doing his best to help the plaintiffs and we are not prepared to rely on his uncorroborated evidence.

Then Mr. Shafi urges that counsel did not attend the Court at several hearings, and did not attend at the close to argue the case. There is certainly no note of their attendance at certain hearings when nothing was done, the case being merely adjourned because the Colony file had not been received. In some of the subordinate Courts we fear attendance is not always carefully noted when the case has merely to be adjourned. But even if counsel did not attend on certain dates when it was known that nothing would be done, this is of no consequence. As to arguments not having been addressed in the first Court Bhagat Ram deposes that there were no arguments, but he does not say why, except that he says "the Court did not pass any order for hearing arguments," which implies that no chance for arguments was given. Had this been so, surely it would have been urged in the grounds of appeal to the Divisional Judge, but we are not shown that this point was ever raised before the Divisional Judge. Mr. Shafi suggests that arguments were not heard because counsel were not engaged to argue the case, but there is no evidence in support of this suggestion and it is opposed to what is suggested by Bhagat Ram's statement as to no opportunity for arguments being allowed. Then it is

urged that the former suit was under valued and that had the defendant's guardian got the valuation corrected there would have been a first appeal to this Court from the District Judge's decree, instead of a second appeal which, though it was an appeal on facts as well as law (as the Punjab Courts Act at that time allowed of a further appeal on facts in suits above a certain value), was dismissed summarily. Mr. Shafi points out that though there was a further appeal on facts as well as law, it was not the common practice of this Court to reverse concurrent findings of fact by two lower Courts, whereas all the facts are fully considered in first appeals. Granting all this, we note that beyond the bare statement that the suit was under-valued Mr. Shafi has done nothing; he has not pointed us to any evidence from which we can say what the correct valuation was. It is of course quite possible that had the present counsel been engaged in the former case the case might have been argued with greater ability, but this alone is no ground for setting aside the former decree.

We agree with the lower Court that the minors were properly represented throughout the former trial, and that there was no negligence on the part of their guardian but that she did all that she could to protect their interests. We uphold the lower Court's order dismissing the suit, and dismiss this appeal with costs.

R. M./R.K. *Appeal dismissed.*

### A. I. R. 1919 Lahore 99

SHADI LAL AND LEROSSINGOL, JJ.  
*Ganga Ram—Plaintiff—Appellant.*

v.

*Amir Chand and others—Defendants—Respondents.*

First Appeal No. 1707 of 1915, Decided on 28th February 1919, from decree of Senior Sub-Judge, First Class, Jhanjg D/- 27th April 1915.

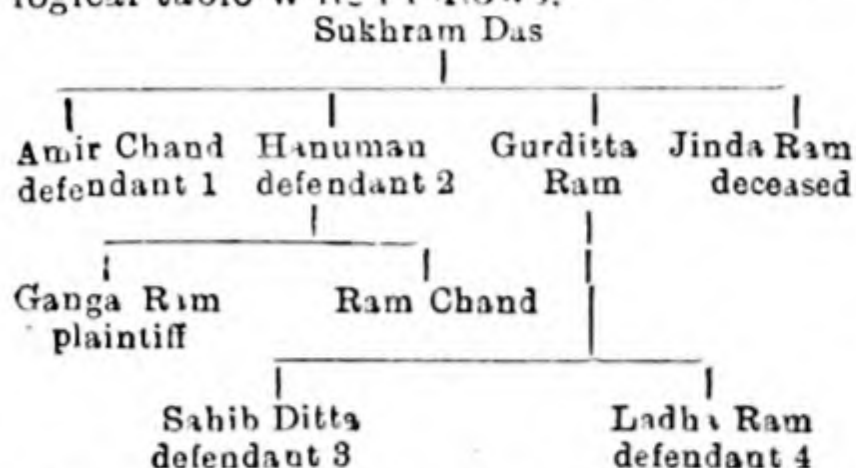
**Hindu Law—Adoption—Giving and taking is essential—Deed of adoption and subsequent treatment as adopted son is not sufficient.**

The Hindu law insists for the validity of an adoption upon the performance of some formal but not necessarily complicated ceremony of giving and taking. [P 100 Q 2]

The execution of a deed of adoption followed by appropriate treatment does not of itself constitute a valid adoption under Hindu law. [P 101 Q 4]



**Judgment.**—The relationship of Ganga Ram, the plaintiff, with the defendants in this case is displayed in the genealogical table which follows:



Before us it is admitted that the contention in the lower Court that the family was joint up to date was not correct, but that the facts were that after 1936 Sambat on the separation of Gurditta Ram the family ceased to be joint but the remaining three brothers remained joint in food and business, although their

In favour of the adoption the following evidence has been relied upon by the plaintiff-appellant. In 1903 Jinda Ram as witness in a case between third parties stated that he had adopted Ganga Ram. He first stated that the adoption had taken place five or six years before 1903, but he added that the adoption had taken place a long time before. The execution of the deed of adoption had occurred five or six years before the date on which he made the statement. In 1905 Jinda Ram at mutation again stated that he had adopted Ganga Ram and he referred to the registered deed of 1898 (p. 49 of the record). On p. 65 is a deed of hypothecation of October 1906 in which Ganga Ram is described as the adopted son of Jinda Ram, and on p. 81 we have the statement made by Jinda Ram at a mutation wherein Jinda Ram again stated in July 1908 that Ganga Ram was his adopted son. On p. 94 is a deed of sale dated July 1909 in favour of Ganga Ram, the adopted son of Jinda Ram. On p. 97 is the will propounded by the defendants as the last will of Jinda Ram in which the testator is made to say that he had adopted Ganga Ram by deed of 19th October 1898. It will be observed that all these pieces of evidence are posterior in date to the execution of the registered deed of adoption of 1898. The parties are Khattris however and governed by their personal law which insists for the validity of an adoption upon the performance of some formal but not necessarily complicated ceremony o



giving and taking. The execution therefore of the document of 1898 followed by an appropriate treatment would not of itself constitute a valid adoption under Hindu law, so that it becomes necessary to examine the evidence bearing on the alleged formal adoption which took place about 1880 or 1881, as alleged by the plaintiff. Now this civil suit was preceded by a dispute at the mutation which occurred on the death of Jinda Ram before the revenue authorities. The only witness who made any statement in support of this adoption of about 1880 was Diwan Chand and he, though alive at the time of this suit, was not called as a witness in this suit. Das Ram (p. 232 of the paper book) states that about 1880 or 1881 he happened to pass Jinda Ram's house and was told that the ceremony of adoption was being performed and that he too being asked to step inside, walked into the house and there saw the ceremony of adoption performed. The next witness Devi Das is a labourer, who states that he saw the adoption, but he cannot tell which other members of the brotherhood were present and Das Ram, witness 1, is similarly unable to state which other members of the brotherhood were present at the ceremony. Lorind Chand is witness 3 on this point, but he too can give no details as to which members of the brotherhood were present and he admits that he was not invited to the betrothal ceremony of the plaintiff. Jai Ram (p. 252) is the last witness who testifies to his presence at the adoption, but he admits like the other witnesses that none of the Chaudhries or leading men of the city were present.

As against the adoption it is urged for the defendants-respondents that neither the members of the family nor the Chaudhries of the city were invited to be present at the ceremony; that admittedly the adoption ceremony was performed not by the family priests but by a stranger who is now dead; that the ceremony of adoption is a simple one and there is no reason why the family priest, even though illiterate, should have been incompetent to perform it. Then it is urged that at the time of the alleged adoption the plaintiff was the only son of his father and it is most improbable that the plaintiff's father would have surrendered him. It is also very im-

probable that at that time, when Jinda Ram was still a young man and had no reason to abandon hope of natural issue he should have adopted a nephew; stress too is laid on the fact that no accounts are produced to show that the expenses of the adoption and of the plaintiff's marriage were paid by Jinda Ram, and we were taken through the accounts on the record from which the respondents attempted to show that even after the execution of the adoption deed of 1898 the plaintiff was not treated as the adopted son of Jinda Ram. With regard to the accounts, however it is admitted that Jinda Ram, Hanuman and Amir Chand had a joint account and even if the plaintiff had been a natural son of Jinda Ram, we should not have expected the accounts to be different in tenor from what we found them.

The respondents have also attempted to show that plaintiff was not born in or about 1875 but was already in existence in 1870, and they also insisted that prior to 1898, the date of the execution of the deed of adoption, he in no document describes himself or is described as the son of Jinda Ram. With reference to the first point a letter of 1872 printed at p. 109 is relied upon as showing that Ganga Ram plaintiff was at that time in existence, and this is supported by the entry in the books of the Hardwar Pandit printed at p. 304 where in 1871 Jinda Ram is made to say that Ganga Ram is the son of Hanuman. If then the plaintiff was born about 1870, he cannot have been four or five years of age but must have been ten or eleven years of age at the time of the alleged adoption in 1880 or 1881, and it is sought to support this contention by the document printed at p. 11 of the paper-book. This document consists of the pleas of Sahib Dayal and Ganga Ram in a case in which they were defendants and therein Ganga Ram is described as the son of Hanuman and an adult. This is corroborated by the deed of compromise in the same case printed at p. 113, and the statement of Ganga Ram in the same case on the same date printed at p. 115. At pp. 172 and 173 are documents dated 1905 in which Ganga Ram is described as the son of Hanuman and although the parentage unlike the signature was not written by Ganga Ram, still the fact that the scribe wrote him as the son



of Hanuman indicates that even at that date he was so regarded by the general public. At p. 374 is a registered mortgage deed dated 1889 wherein the plaintiff is described as the son of Hanuman.

A careful consideration of all the evidence in the case leads us to the conclusion that in 1889 Ganga Rsm was clearly an adult and therefore he could not have been born in 1875 or thereabout but must have been born about 1870 and therefore if he was adopted in 1880 or 1881 he must have been at that time not merely four or five years of age but ten or eleven years old. The next point to observe is that prior to the execution of the so called deed of adoption of 1898, Ganga Ram is nowhere described as the son of Jinda Ram and even after 1898 he is not so described invariably. The time of the alleged adoption then has not been clearly established. The evidence as to the factum of adoption is very meagre, jejune and unconvincing and the conduct of the alleged adoptee cannot be said to bear out the story of the adoption. For these reasons we are driven to conclude that for some reason or other Jinda Ram was induced in 1898 to execute this document in which he declared that the plaintiff was his adopted son, but we are not at all satisfied that as a matter of fact he had, as alleged, adopted the plaintiff in his childhood and in the absence of proof of such formal adoption we must hold that plaintiff has not established any adoption as provided for by his personal law.

For these reasons we dismiss the appeal with costs.

R.M./R.K. *Appeal dismissed.*

### A. I. R. 1919 Lahore 102

SCOTT-SMITH AND BROADWAY, JJ.

*Lalli and another*—Defendants—Appellants.

v.

*Sain Ditta and others*—Plaintiffs—Respondents.

Misc. Appeal No. 3221 of 1917, Decided on 30th May 1918, from order of Dist. Judge, Lahore, D/- 2nd July 1917.

Limitation Act (9 of 1908), S. 5—Absence of intimation of delivery of judgment as required by O. 41. R. 30 is sufficient cause for extension.

An appeal was argued before a District Judge on 24th May. Judgment was reserved and was ultimately issued under date 2nd July. It ap-

peared that the provisions of O. 41, R. 30, were not complied with and that no intimation was sent to the parties of the pronouncement of the order. It was not till 18th October that the appellant's pleader discovered what the decision of the Court was and thereupon he promptly communicated with his client, applied for copies and filed an appeal in the Chief Court on 26th November:

*Held:* (1) that under the circumstances, time should be taken to run only from 18th October and that therefore the appeal was within limitation, and

(2) that in any event the facts disclosed constituted sufficient cause within the purview of S. 5 and justified an extension of the period prescribed. [P 103 C 1]

*Mehr Chand*—for Appellants.

*Tirath Ram*—for Respondents.

**Judgment.**—The facts of this case are these: Hira and Thakar Singh were brothers being the sons of one Chanda. Thakar Singh apparently managed the affairs of the family and after the death of Chanda, which occurred in Sambat 1952, the moveable property was divided but the lands remained joint. Certain land in the village of Thati Farid, Kasur Tahsil, had been taken on mortgage on 16th February 1894. This mortgage was effected in the name of Thakar Singh, but the entire family enjoyed the profit thereof. Thakar Singh died in October 1913 and subsequently his sons, the present defendants, sold their mortgage rights to defendants 3 to 5 by a registered deed of sale, dated 3rd September 1914. The plaintiffs who are the sons of Hira, instituted the suit claiming possession of half of the land on the ground that it belonged to the entire family. The trial Court held that the mortgage had been effected with ancestral funds and that the plaintiffs had been taking a share of the produce of the land and accordingly were entitled to possession of one half. A decree was therefore granted to the plaintiffs for possession of half of the land mortgaged, but it was also ordered that defendants 3 to 5 could avoid surrendering possession by paying to the plaintiffs the sum of Rs. 1,500 within one month. Against this decree the sons of Thakar Singh preferred an appeal to the District Judge, who agreed with the findings arrived at by the lower Court as to the land having been acquired out of ancestral funds and the plaintiffs having taken a share of the produce of the land, but held that the decree for possession in default of the payment of Rs. 1,500 was not in accordance "either



with the plaint or law." He also held that if the sale to defendants 3 to 5 were held to be bona fide, it would be for defendants 1 and 2 to pay the money. He accordingly remanded the case to the trial Court under O. 41, R. 23, Civil P. C.

Against this order of remand defendants 1 and 2, the sons of Thakar Singh, have filed this appeal through Diwan Mehr Chand, and we have heard Mr. Tirath Ram on behalf of the respondents-plaintiffs. Mr. Tirath Ram took a preliminary objection to the effect that the appeal to this Court was barred by time as having been filed more than 90 days after the order of remand. It appears that the appeal in the lower appellate Court was argued on 24th May 1917. Judgment was reserved and was ultimately issued under date 2nd July 1917. The appeal to this Court was filed on 26th November 1917, i. e., a considerable period beyond the prescribed 90 days. The appellants have however filed two affidavits (1) sworn to by Lala Gobind Ram, their pleader in the lower appellate Court, and (2) by Lalli, one of the appellants. According to these affidavits, it appears that the order appealed against was never pronounced in accordance with law. Lala Gobind Ram some time in July learnt that his appeal had been accepted and the case remanded. It was not however till 13th October 1917, that he discovered what the exact decision of the lower appellate Court was. Thereupon he promptly communicated with his client, applied for copies and filed this appeal. A reference to the record shows that the provisions of O. 41, R. 30, Civil P. C., had not been complied with, and further that no intimation had been sent to the parties as to the pronouncement of the order. In these circumstances we are of opinion that time should only begin to run from 13th October 1917 and that the appeal is therefore within limitation. In any event we are of opinion that the facts disclosed constitute sufficient cause within the purview of S. 5, Lim. Act, which would justify an extension of the period prescribed. In these circumstances we hold that the appeal is within time.

The next point for determination is whether the order of remand is justified. As to this it is perfectly clear that the decision of the trial Court was not on

any preliminary point but disposed of the case in its entirety. With the principal findings the lower appellate Court expressed its agreement and directed an inquiry on a matter which it was competent to dispose of itself. We accordingly accept this appeal and set aside the order of remand. The case will go back to the District Judge, who will rehear the appeal and come to a definite finding on the various points raised. The District Judge will of course be entitled to remand any matter under O. 41, R. 25, Civil P. C., should he consider such a course necessary. Costs in this Court will follow the event. The attention of the District Judge is drawn to the fact that the decree drawn up by the trial Court is not in accord with the judgment. The trial Court in its judgment held that defendants 3 to 5 could avoid giving possession of the land by paying the plaintiffs the sum of Rs. 1,500, whereas in the decree the plaintiffs are declared liable to pay Rs. 1,500 as a condition precedent to obtaining possession.

R.M./R.K.

*Appeal accepted.*

### A. I. R. 1919 Lahore 103

LEROSSIGNOL, J.

*Nur Muhammad*—Defendant—Appellant.

v.

*Ram Das and another*—Plaintiff and Defendant—Respondents.

Second Appeal No. 2326 of 1918, Decided on 7th December 1918, from order of Addl. Dist. Judge, Lahore, D/- 20th April 1918.

Limitation Act (1908), S. 12 — Not time actually spent but time requisite can be deducted—Days for which copies lie ready undelivered cannot be deducted.

What has to be regarded under S. 12, Lim. Act, is not the time actually spent in securing the copies but the time requisite for that purpose. [F 104 O 1]

An appellant is not therefore entitled to deduct the days during which the copies lie ready but undelivered in the office. [P 104 O 1]

*Badrud-Din Kureshi*—for Appellant.

*Nand Lal*—for Respondents.

**Judgment.**—The Court below dismissed the appeal as time-barred, holding that the appellant was not entitled to reckon out three days during which the copy of the Original Court's judgment lay undelivered and also one day of delay caused by the appellant's failure to make a deposit against the cost of the copy and that the appeal was consequently late.



I do not think that the appellant can be blamed for failing to put in a deposit with the application, for a deposit is not necessary in every case, and no undue delay occurred in making the deposit. But as regards the three days during which the copy lay undelivered, the weight of authority is against appellant. What has to be regarded is not the time actually spent in securing the copies, but the time requisite for that purpose and unless a strict rule be adopted, great confusion and doubt will arise. For this reason I must hold that the appeal was time barred, for there was no excuse for first presenting it to the Subordinate Judge's Court. The appeal is dismissed with costs.

R.M./R.K.

*Appeal dismissed.***A. I. R. 1919 Lahore 104**

LEROSSIGNOL AND MARTINEAU, JJ.

*Tika Ram and others*—Defendants—Appellants.

v.

*Yasin Khan and others*—Plaintiffs—Respondents.

Second Appeal No. 1538 of 1915, Decided on 4th December 1918, from decree of Dist. Judge, Delhi, D/. 23rd February 1915.

**Civil P. C. (1908), O. 32, R. 1—Suit on behalf of minor by next friend—Next friend guilty of gross negligence in conduct of suit—Minor is not bound by result of suit—Fresh suit on attaining majority is maintainable—Minor, Decree against.**

In 1908 the plaintiffs, of whom Y was a minor, sued for possession of 68-14/20 bighas of land with the shamilat appertaining thereto by redemption of a mortgage and obtained a decree, but the suit was described in the heading of the decree sheet as one for possession of 68-14/20 bighas, no mention being made of the shamilat. The defendants' appeal to the Chief Court was dismissed, but in the Chief Court decree also the shamilat was not mentioned. On discovering the mistake the plaintiffs applied for amendment of the decree but the application was rejected. They then sought to obtain a share of the shamilat by applying for it in execution of the decree but this application also was eventually dismissed, the Chief Court holding in second appeal that the shamilat had been intentionally excluded from the decree. Subsequently Y on attaining majority sued for possession of the shamilat on the ground that A his next friend in the former suit, had been grossly negligent:

**Held:** (1) that the Court having held that the shamilat was intentionally omitted from the decree it was the duty of the next friend to appeal from that decree and that he was guilty of gross negligence in not doing so; (2) that the plaintiff was not precluded from suing for the shamilat by the fact that he first tried to obtain it in other ways; (3) that the plaintiff was not

entitled to more than his own share of the shamilat, the suit being based solely on the ground that his interests had been neglected by the guardian. [P 105 C 1]

*Moti Sagar*—for Appellants.*Sham Lal*—for Respondents.

**Judgment.**—In 1908 the plaintiffs, of whom Yasin Khan was a minor, sued for possession of 68-14/20 bighas of land, with the shamilat appertaining thereto, by redemption of a mortgage. The defence was that a contract had been made by which the plaintiffs got part of the mortgaged land free of incumbrance, and the rest was sold to the defendants for the amount due on the mortgage. The first Court dismissed the suit, but on appeal the Divisional Judge on 19th July 1909 passed a decree in the plaintiffs' favour, finding that the alleged sale had not taken place. The decree given was for possession of the property in suit but the suit was described in the heading of the decree sheet as one for possession of 68-14/20 bighas, no mention being made of the shamilat. The defendants appealed to the Chief Court, but the appeal was dismissed. In the Chief Court decree also the shamilat was not mentioned.

The plaintiffs, on discovering that the shamilat had been omitted, applied to the Chief Court for amendment of the decree, but the application was rejected, the plaintiffs being informed that they ought to have filed cross-objections or appealed. An application by them for review of judgment was also rejected. They then sought to obtain a share in the shamilat by applying for it in execution of the decree. Their application was dismissed by the executing Court, but granted on appeal by the Divisional Judge, who was of opinion that the intention of his predecessor in passing the decree of 19th July 1909 was to include the shamilat in the decree, and that its omission in the heading of the decree had been a clerical mistake. On second appeal however the Chief Court on 22nd December 1913 held that the shamilat had been intentionally excluded from the decree, and it restored the order of the first Court. The present suit was brought by Yasin Khan after having attained majority, for possession of the shamilat, 176 bighas in area, on the ground that Amin Khan, his next friend in the former suit, had been grossly negligent in not appealing from the Divisional Court's



decree of 19th July 1909. Amin Khan, Mahomed Khan and Rahmat Khan, who were at first impleaded as defendants, were afterwards made plaintiffs.

The Subordinate Judge passed a decree in Yasin Khan's favour for his  $\frac{1}{4}$ th share of the shamilat, and this has been affirmed by the District Judge on appeal. Both Yasin Khan and the defendants have appealed to this Court. For the defendants it is contended that Amin Khan was under the impression that the shamilat was included in the decree of 1909, that there was no negligence on his part in not appealing against it or filing cross-objections in the defendants' appeal, and that at the most he might be said to have committed an error of judgment. We think that there is no force in this contention, and that the lower Courts have come to a correct decision, which is also in accordance with equity. This Court having held on 22nd December 1913 that the shamilat (to which the plaintiffs would have been entitled) was intentionally omitted from the Divisional Court's decree in 1909, we are of opinion that it was Amin Khan's duty, in the interests of the minors, to appeal from that decree, and that he was guilty of gross negligence in not doing so. On this finding Yasin Khan is entitled to the decree he has been given. He is not as is contended by defendants' counsel, precluded from suing for the shamilat by the fact that he first tried to obtain it in other ways.

With regard to the appeal of the plaintiff Yasin Rhan, we agree with the lower Courts that he is not entitled to a decree for more than his own share of the shamilat, the suit being based solely on the ground that his interests had been neglected by his guardian. The argument as to piecemeal redemption not being allowed does not apply, as this is not a suit for redemption. We dismiss both the appeals with costs.

R.M./R.K.

*Appeal dismissed.*

### A. I. R. 1919 Lahore 105

BROADWAY, J.

*Mt. Gauran—Appellant.*

v.

*Brij Raj Saran—Respondent.*

Misc. First Appeal No. 1223 of 1918,  
Decided on 21st June 1918.

Civil P. C. (1908), O. 41, R. 19.—  
Power to order restoration is discretionary

—Pleader's mistake in noting date is sufficient cause for restoration.

An act of negligence or a mistake on the part of an appellant's pleader cannot be regarded as a sufficient cause within the meaning of the law, to set aside an order dismissing an appeal in default of appearance. At the same time, it is discretionary with the Court to pass an order of restoration if it considers that a case for such an order is made out although the case may not amount to a "sufficient cause."

(P 105 C 2, P 106 C 1)

Thus, where an appellant was notified that his appeal would be heard on 17th July, but his pleader by an error noted in his diary the date of hearing as the 17th July and on that date appeared and learnt that the appeal had been dismissed in default on the previous day and immediately applied for restoration of the appeal.

*Held:* that as the default was not intentional and was due to an error on the part of the appellant's pleader, the case was one in which an order for the restoration of appeal should be made.

(P 106 C 1)

*Fakir Chand—*for Appellant.

*Jagan Nath—*for Respondent.

**Judgment.**—The facts of this appeal are as follows: In April 1917 the District Judge of Ambala fixed 16th July 1917 for the hearing of an appeal filed by the present plaintiff. The appeal was to be heard at Simla and the notice of date was sent to the appellant's counsel only. On this notice the date was clearly given as 16th July 1917 and it was served on the appellant's pleader on the 21st April 1917. By an error the pleader entered the date in his diary as 17th July 1917 and on that date, i. e. the 17th July 1917, he appeared at Simla before the learned District Judge to find that his appeal had been dismissed in default on the previous day. He at once filed an application for restoration of the appeal which was however dismissed on 4th January 1918 and against this order of dismissal the present appeal has been preferred through Mr. Fakir Chand and I have heard Lala Jagan Nath for the respondent. Lala Fakir Chand contended that the nonappearance of his client as well as of his pleader was due to a misunderstanding and was in no way intentional. In this I agree, for there can be no doubt that the appellant would not have gone to the expense of taking counsel to Simla the day after the hearing of the appeal itself. I do not however think that this negligence or mistake on the part of the appellant's pleader can be regarded as a sufficient cause within the meaning of the law. At the same time it is within the discretion of the Court to pass an order



of restoration, if it considers that a case for such an order is made out, although the case may not amount to a "sufficient cause." In this view I am supported by *Somayya v. Subbamma* (1) cited by Lala Fakir Chand. Lala Jagan Nath contended that on the merits of the appeal itself restoration should not be ordered. I am however not prepared to go into the merits of the appeal, inasmuch as that is for the learned District Judge to consider. In my opinion, inasmuch as the default was not intentional and was clearly due to an error on the part of the appellant's pleader I think the appeal should have been restored, and I accordingly accept this appeal setting aside the order of dismissal in default return the case to the learned District Judge for disposal on the merits. The appellant will however have to pay the sum of Rs. 32 to the opposite party before his appeal is heard; and the learned District Judge should fix a date for the payment of the costs I have ordered in his Court. Should the costs be not paid by the date fixed by the learned District Judge he will dismiss the appeal.

R.M./R.K. *Appeal accepted.*

(1) [1903] 26 Mad. 599.

### A. I. R. 1919 Lahore 106

SCOTT-SMITH AND WILBERFORCE, JJ.

*Mahna Singh and others*—Plaintiffs—Appellants.

v.

*Bahadur Singh and others*—Defendants—Respondents.

First Appeal No. 1532 of 1915, Decided on 26th February 1919, from order of Sub-Judge, Gujranwala, D/- 15th April 1915.

(a) Court-fees Act (7 of 1870), S. 7 (5) (c) and (d)—Cl. (c) and not Cl. (d) applies to lands assessed separately to fluctuating revenue.

Sub-Cl. (d), S. 7 (v) provides merely for the case of lands excepted from the operation of sub-Cls. (a), and (b), and has no reference to the case of an entire estate or a definite fraction or part of an estate, and therefore no application to lands assessed to fluctuating revenue. The case of lands subject to fluctuating assessment is therefore governed by sub-Cl. (c), S. 7 (v).

[P 107 C 1]

(b) Court-fees Act (7 of 1870), S. 7 (5) (c)—Term "such revenue" means actual revenue payable on estate or definite share of estate.

The words "such revenue" in sub-Cl. (c), S. 7 (v) must be construed either as "annual revenue payable to Government" or more fully as

annual revenue payable to Government on an entire estate or a definite share or part of an estate fixed permanently or not permanently.

[P 107 C 1]

*Badri Nath Kapur*—for Appellants.

*Beni Prashad Khosla*—for Respondents.

**Judgment.**—Plaintiffs in this case sued for possession of 1,894 kanals 8 marlas out of a joint holding of 5,922 kanals 18 marlas. They valued their relief for purposes of court-fee at Rs. 3,731-14-0, being ten times the revenue assessed on the land. On objections being taken by the defendants that the court-fee paid was insufficient, it was ascertained that the land was subject to a fluctuating assessment, and it was ordered that the market-value should be assessed. A commission was issued to the Clerk of Court of the District Judge, who found the market-value to be Rs. 62,420, and the plaintiffs were ordered to pay court-fee accordingly on 25th March 1915 and were given six days for the purpose. They were unable to pay within that time and asked for further time, which was granted till 15th April. They were still unable to pay on that date and their plaint was rejected. Against this decision plaintiffs preferred an appeal to this Court, and it has been held separately by a Full Court that an appeal is competent, so far as the decision of the lower Court is concerned with the classification of the suit for the purposes of court-fees. It has therefore to be decided by us which clause or sub-clause of S. 7, Court-fees Act, covers the case of land subject to a fluctuating assessment.

The lower Court in ordering the court-fee to be paid upon the market-value made no special reference to any clause or sub-clause, but presumably the sub-clause considered applicable was sub-Cl. (d). Counsel for the appellant contended that this clause was not applicable, but was unable to cite any authority. We have also been unable to discover any published authority except one in the Punjab Law Reporter, viz., *Wasawa Ram v. Bahadur Chand* (1). There is also an unpublished judgment of Kensington, C. J., in Civil Appeal No. 37 of 1913, in which it was held that sub-Cl. (d) applied to such cases. We have also consulted Civil Appeal No. 951 of 1914 in which Shah Din, J., took a simi-

(1) [1914] 25 I. C. 24.



lar view for granted without any discussion. None of these authorities appear to be of much value. In the unpublished decision of Kensington, C. J., there is no discussion of the point involved and the same is the case in *Wasawa Ram v. Bahadur Chand* (1), which concerned colony land in Lyallpur apparently assessed to fluctuating revenue though this matter is not clear from the judgment, and we have been unable to verify it from the record. In our opinion Cl. (d) can have no application to land assessed to fluctuating revenue. Sub-Cls. (a) and (b) provide for the court-fee payable on an entire estate or on definite fractions or parts or an estate assessed permanently or temporarily. Sub-Cl. (d), in our opinion, provides merely for the lands excepted from the operation of sub-Cl. (a) and (b). Moreover it may be noticed that sub-Cl. (d) has no reference to the case of an entire estate or a definite fraction or part of an estate. It can therefore have no general application to lands assessed to fluctuating revenue; and we disagree with the view that it generally covers such cases.

Excluding sub-Cl. (d), there remain only sub-Cls. (b) and (c) which can in any way be applicable. The applicability of Cl. (b) can at once be rejected as in the case of fluctuating assessment no annual revenue payable to Government is settled. The system followed in the case of such assessments is to make an assessment upon the crops of each harvest and fix the revenue according to the rates previously determined. There remains therefore sub-Cl. (c) which counsel contends, and rightly in our opinion, governs the case of lands subject to fluctuating assessment. The words "where the land pays no such revenue" obviously exclude merely the land mentioned in the two previous sub-clauses; otherwise there would be no object in the use of word "such." The words "such revenue" must be construed either as "annual revenue payable to Government," or more fully as annual revenue payable to Government on an entire estate or a definite share or part of an estate fixed permanently or not permanently. Lands subject to fluctuating assessment cannot be considered as paying annual revenue to Government, inasmuch as the assessment is on each harvest according to crops. It is obvious that such land may pay revenue once a

year, twice a year or even thrice, or perhaps not at all. There is no justification in our opinion for holding that the words "where land pays no such revenue" refer only to the case of lands totally exempted from the payment of revenue otherwise, the word "such" would be meaningless. We disagree therefore with the finding of the lower Court and hold that court-fee is payable under sub-Cl. (c) and return the record to the lower Court for a valuation to be made as required by that clause. The appeal is therefore accepted to the above extent. The parties can bear their own costs in these proceedings. We may notice that the other grounds of appeal were not pressed before us.

R.M./R.K. *Appeal partly accepted.*

### A. I. R. 1919 Lahore 107

WILBERFORCE, J.

*Nabi Bakhsh*--Defendant--Appellant.  
v.

*S. Sajid Ali and others*--Plaintiff and Defendants--Respondents.

Second Appeal No. 1511 of 1918, Decided on 17th January 1919, from decree of Dist. Judge, Karnal, D/- 8th January 1918.

**Practice**--New case--Judge cannot decree claim on new grounds not pleaded.

Plaintiff sued for pre-emption alleging his superior right to the vendee on the grounds that he had a pre-emptive title under Mahomedan law and that he was a collateral of the vendor. It was found that he had no right under either portion of his claim, but the Court granted him a decree holding that he had a right to succeed as he was an agriculturist while the vendee was not:

**Held**: that the Court was not justified in setting up an entirely new case for the plaintiff and he was not entitled to a decree, as he had not raised the ground in his plaint or his pleadings. [P 108 O 1]

*Tek Chand*--for Appellant.

**Judgment.**--In this case the plaintiff sued for pre-emption alleging his superior right to the vendee on two grounds: (1) that he had a pre-emptive title under Mahomedan law and (2) that he was a collateral of the vendor. Both the Courts below have held he had no right under either portion of his claim. The alleged common ancestor of himself and the vendor had died some 120 years ago. The lower appellate Court however set up an entirely new case for the plaintiff and held that he had a right to succeed as he is an agriculturist while the vendee is not. The plaintiff's claim was therefore decreed.



Against this decision a second appeal has been preferred to this Court and must succeed, as the ground on which the plaintiff has been allowed a decree by the lower appellate Court was never raised by him in his plaint or his pleadings and defendant had no opportunity to reply to the position taken up by the lower appellate Court: *Zora Singh v. Jagta Singh* (1) is a judgment on a similar point; but it must be noted that in that case the plaintiff had subsequently amended his plaint while in the present case no such amendment took place. I hold therefore that the lower appellate Court was in error in setting up an entirely new case on behalf of the plaintiff and accepting the appeal, dismiss the suit with costs.

R.M./R.K.

*Appeal dismissed.*

(8) [1917] 83 P. R. 1917=42 I. C. 263.

**A. I. R. 1919 Lahore 108 (1)**

KENSINGTON, C. J.

*Mengha Ram and others*—Plaintiffs—Petitioners.

v.

*Hassu and others* — Defendants—Respondents.

Civil Revn. No. 928 of 1914, Decided on 4th November 1914, from order of Dist. Judge, Mianwali, D/- 9th May 1914.

Limitation Act (1908), Arts. 52, 57, 65, 115 and 120 — Suit for recovery of grain advance — Article applicable is Art. 65 or Art. 115 and not Arts. 52, 57 or 120.

A suit for the recovery of grain advanced together with interest in kind or its value is governed either by Art. 65 or by Art. 115, and not by Art. 52 or Art. 57 or Art. 120 of the Act.

[P 108 C 1]

*Govind Das*—for Petitioner.

**Judgment.**—*Achhar Mal v. Hukman* (1) does not support ground 3, and it cannot be said here that there were fresh breaches from year to year giving fresh periods of limitation. Mr Govind Das urges that in the absence of any Article dealing specifically with advance of grain he will get the benefit of Art. 120. Plaintiff can get no extension of time under the Punjab Loans Limitation Act 1 of 1904, as his claim in respect of grain advances will fall under Art. 65 or Art. 115, Limitation Act Schedule.

R.M./R.K.

*Appeal dismissed.*

(1) [1897] 28 P. R. 1897.

**A. I. R. 1919 Lahore 108 (2)**

BROADWAY, J.

*Darbari Mal*—Receiver—Petitioner.  
v.

*Kanshi* — Decree-holder — Opposite Party.

Civil Revn. No. 700 of 1917, Decided on 1st August 1918, from order of Munsif, First Class, Chunian, D/- 19th May 1917.

Civil P. C. (1908), O. 21, R. 57 — Sapurdar cannot make over property on attachment terminating under R. 57—He will be held liable for non-production when called upon.

A sapurdar of attached property has no warrant or justification in making over the property to the judgment-debtor upon an attachment of the property coming to an end by virtue of O 21, R. 57. Inasmuch as the property is made over to his care by the Court, he is responsible to the Court for its production and if he is unable to produce it when called upon to do so, he is liable to pay its value. [P 108 C 2]

*Lal Chand Khosla*—for Petitioner.

*Badri Nath*—for Opposite Party.

**Judgment.**—Certain property having been attached in execution of a decree, it was made over to Darbari Mal as sapurdar. Various objections were then made by different persons, who claimed that the attached property was theirs. These objections were decided one after the other in favour of the decree-holder who however failed to put in an appearance at a hearing of the execution proceedings, with the result that the application to execute the decree was dismissed in default. On application it was restored and an order was passed for the sale by auction of the property that had been attached.

Darbari Mal, the sapurdar, then came forward as an objector and alleged: (1) that he had made over the property to the judgment-debtor because the attachment ended when the application was dismissed in default; (2) that no sale could be ordered till the property had been re-attached. His contentions are correct up to a certain point. No doubt, the attachment came to an end by virtue of O. 21, R. 57, Civil P. C., and before sale the property must be re-attached, but his action in making over the property to the judgment debtor is without warrant or jurisdiction. The property had been made over to his care by the Court, and he is responsible to the Court for its production—if he is unable to produce it when called on to do so, he is



liable to pay the value. I accordingly return the case to the executing Court, who will proceed according to law and recover the value of the property from Darbari Mal if he is unable to produce the property. No order as to costs.

R.M./R.K. Case returned.

### A. I. R. 1919 Lahore 109 (1)

SCOTT-SMITH, J.

*Mewa Singh*—Defendant—Appellant.

v.

*Narain Singh*—Plaintiff—Respondent.

Second Appeal No. 1596 of 1918, Decided on 20th March 1918, from decree of Dist. Judge, Ferozepore, D/- 19th March 1918.

Limitation Act (1908), Art. 115—Suit for damages for breach of betrothal contract—Plaintiff must prove that contract was broken within three years.

In a suit for damages for breach of a betrothal contract, the onus is in the first instance upon the plaintiff to prove that the betrothal contract was broken within three years of his bringing the suit.

[P 109 C 2]

*Nand Lal*—for Appellant.

*Mehr Chand*—for Respondent.

**Judgment.**—The suit out of which the present appeal arises was for Rs. 600 on account of damages for breach of betrothal contract. The betrothal was admitted, but the defendant said that it had been cancelled because it was found out afterwards that the plaintiff's maternal grandmother was an abducted woman. The first Court held that it was proved that this grandmother was an abducted woman and that this justified the defendant in breaking off the betrothal. It therefore dismissed the suit. It also held that the suit was time-barred because the betrothal took place when plaintiff was 18 years of age and his age as given in the plaint was 22 years. Apparently the finding was based on the fact that the suit was not brought within three years of the plaintiff attaining his majority. The lower appellate Court held that the abduction of plaintiff's grandmother was not proved and that the suit was within time and gave the plaintiff a decree for Rs. 60 with proportionate costs. From this order the defendant has filed a second appeal to this Court.

The only point for decision is whether the suit is barred by time or not. It appears from the judgment of the first Court that some evidence was given to the effect that one month after the betrothal the de-

fendant announced his intention of breaking off the contract of betrothal. There is however no clear finding by the first Court that the contract was actually broken more than three years before the suit was instituted. The lower appellate Court says that there is no proof at all on the record about the plaintiff's age and that the onus of the issue having been on the defendant and he not having discharged it, the suit should be held to be within time. In my opinion, the onus was in the first instance upon the plaintiff to prove that the suit was within time. It is contended on his behalf that if the onus had been placed on him he would have produced for the purpose of discharging it, and I am asked that if the onus is shifted on to him he may be given an opportunity of producing evidence. This is quite reasonable. As to the age of the plaintiff he stated it to be 22 in his plaint and the betrothal admittedly took place when he was 18. It was therefore for him to show that the betrothal contract was broken within three years of his bringing the suit.

On the question of limitation alone therefore I accept the appeal and setting aside the order of the lower appellate Court I remand the case thereto for re-decision after allowing the parties a further opportunity of producing evidence upon the sixth issue, the onus of which is in the first instance upon the plaintiff. As the plaintiff has not appealed from the order of the lower appellate Court, he is bound by its finding as to the amount of damages to which he is entitled. If the lower appellate Court again decides that the suit is within time, it should not give him a decree for a larger amount than it has already given him. The stamp in this Court will be refunded and other costs will be costs in the case.

R.M./R.K.

Case remanded.

### A. I. R. 1919 Lahore 109 (2)

LE ROSSIGNOL, J.

*Jumma Ram*—Plaintiff—Appellant.

v.

*Mt. Soni Bai* and another—Defendants—Respondents.

Second Appeal No. 685 of 1918, Decided on 16th May 1918, from decree of Dist. Judge, Multan, D/- 22nd November 1917.

Transfer of Property Act (1882), S. 91—Hindu surrendering possession of her estate



to reversioner—Latter to hold estate for her and pay her maintenance—Title to remain in widow—Reversioner has interest entitling him to redeem mortgage on estate.

A Hindu widow surrendered the possession of her estate to the next reversioner of her husband who covenanted to hold the estate, for her and to pay her a fixed sum for maintenance. The title to the estate remained in the widow:

*Held*: that the reversioner had such an interest in the estate as entitled him to redeem a mortgage on the estate. [P 110 C 1]

*Hargopal*—for Appellant.

*Roshan Lal*—for Respondents.

**Judgment.**—By a compromise Mt. Soni Bai surrendered the possession of her estate to her next heir the appellant, who covenanted to hold the estate for her and pay her a fixed sum in cash and grain for her maintenance, whilst Soni Bai was to retain the title. The question for decision is whether the appellant has acquired such an interest in the estate as qualifies him to redeem. In my opinion he has; he has possession of the estate and has undertaken to pay an annual sum out of that estate, consequently he is interested in disencumbering it. He may redeem from the prior mortgagee, and will then himself stand in the shoes of that prior mortgagee, if at any time he loses possession of the land. I accept the appeal and decree for plaintiff with costs throughout.

R.M./R.K. *Appeal accepted.*

### A. I. R. 1919 Lahore 110 (1)

LEROSSIGNOL, J.

*Pal Singh and another*—Defendants—Appellants.

v.

*Jamun and others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 113 of 1918, Decided on 23rd May 1918, from decree of Dist. Judge, Amritsar, D/- 10th November 1917.

**Pre-emption—Right of—Right once accruing is not defeated by resale.**

Where once a sale has been effected and a right of pre-emption has accrued in respect thereof, the right cannot be defeated by a re-sale to the vendor. [P 110 C 2]

*Lal Chand Mehra*—for Appellants.

*Badr-ud-Din Kureshi*—for Respondents.

**Judgment.**—The question for decision in this appeal, No. 114 of 1918, is the same. The claim to pre-empt is met by the plea that the sales have been cancelled. The sales took place on 22nd March 1916, and were cancelled on 13th Feb-

ruary 1917. The suits were brought on 14th February 1917, and their institution evidently inspired the re-sale or alleged cancellation. That transaction was clearly a re-sale and not a cancellation. The pre-emptor's rights accrued on 22nd March 1916, and cannot be defeated by a re-sale to the vendor. *Bahadur v. Motee Ram* (1) is an authority to the contrary, but it is very ancient and does not represent the law as at present ascertained. The appeal is dismissed with costs.

R.M /R.K. *Appeal dismissed.*

(1) [1867] 39 P. R. 1867.

### A. I. R. 1919 Lahore 110 (2)

SCOTT-SMITH, J.

*Sant Ram*—Accused—Petitioner.

v.

*Emperor*—Opposite Party.

Criminal Revn. No. 778 of 1918, Decided on 15th November 1918, reported by Sessions Judge, Attock, with his No. 747 of 26th June 1918.

**Punjab Municipal Act (3 of 1911), S. 173—Depositing goods on road side without permission is not offence when site is let out.**

The essence of an offence under S. 173 is the placing of goods on a street without the permission of the Municipal Committee, but where such permission is not necessary, the Committee having farmed out its rights to a third person, no offence under the section can be committed. [P 111 C 2]

*Badrudin Kureshi*—for Petitioner.

**Facts.**—There is no dispute about the facts of this case. On 5th February 1918 the Municipality of Hazro leased out Phari—Teh Bazari (the right to stock goods on a specified portion of a street) to one Bhag Mal for Rs. 70. It was stipulated that the lessee was to have the same rights as the Municipality in respect of the property leased and that he was entitled to realise the rent from any one who deposited his goods there for sale. The petitioner deposited his goods on a portion of the site without the permission of the lessee and the Honorary Magistrate, 1st Class, at Hazro on a complaint made by the Secretary of the Committee convicted and sentenced the petitioner to a fine of Rs. 6 under S. 173 (c), Municipal Act. The accused, on conviction by Khan Bahadur Muhammad Azim Khan, exercising the powers of an Honorary Magistrate of the 1st Class in the Attock District, was sentenced by order, dated 26th April 1918, under S. 173, Act 3 of 1911, to a fine of Rs. 6.



**Grounds.**—S. 173 provides for a penalty in case of unauthorised projections and obstructions and the main contention put forward on behalf of the petitioner is that where the Municipality has itself leased out the property for a specified purpose, it can have no grievance. The learned Public Prosecutor for the Crown contends that the nature of the property, viz., that it is a street, is not altered by the fact of the lease and S. 173 would still be applicable. In my opinion the conviction is not justified. The Committee has a right to prevent encroachments and obstructions on its property and the law as laid down in S. 173, Municipal Act, provides for the due protection of that right. At the same time the Committee, in exercise of its rights of ownership, can decide that a particular portion of its property should be set apart for use for a specified purpose by an individual, class of persons or by the public. It can also impose conditions subject to which the right of user can be exercised. In the present case it is clear from the deed of lease itself that the Committee has decided to set apart a portion of the street for use by the public, the use being for a specified purpose, viz., that of depositing goods for sale. The right was subject to a condition that the user shall be subject to payment of rent. The amount of rent and the manner in which it was to be realised from every individual using the property were not decided upon because the Committee decided to farm out its rights. These details were left to the lessee, from whom the Committee realised all the rent which it reasonably expected to realise if it had kept the whole thing in its own hands.

There has thus been no default qua the Municipality. The property has not been used for any other purpose except the one specified and that body is not pecuniarily affected because it has realised the rent from the lessee. There can be no obstruction where the property is used in the manner it is intended to be used, and the failure to pay rent only, even if the committee had to realise it itself and there had been no lease, is clearly not an obstruction contemplated by the Act. But in this case the Committee has no reason even for that complaint. Where the Committee's own rights are not infringed in any manner, I do not consider that it

can have any justification to import the penal provisions of the Act to protect its lessee against default in payment of rent by sublessees who actually use the property. This is exactly what has been attempted in this case. I would for these reasons consider that the conviction cannot be maintained and I order that the record be submitted to the Chief Court with the recommendation that the conviction be quashed and fine refunded.

**Order.**—For the reasons given by the learned Sessions Judge I am of opinion that this conviction cannot stand. S. 173 Punjab Municipal Act obviously cannot apply to a part of a street leased out to a person for the express purpose of his renting portions of it to shopkeepers for placing thereon their goods for sale. What Sant Ram should have done was to rent a portion of the site from Bhag Mal or to get the latter's permission to place his goods on it. If without doing this he placed his goods on the site, he may have rendered himself liable to an action for damages on the part of Bhag Mal, but he did not commit any offence within the meaning of S. 173, Punjab Municipal Act. The essence of such an offence is the placing of goods on a street without the permission of Municipal Committee, but where such permission is not necessary, the Committee having farmed out its rights to a third person, no offence under the section can be committed. I therefore set aside the conviction and sentence, and acquit Sant Ram. Fine, if paid, to be refunded.

R.M./R.K.

*Petition accepted.*

**A. I. R. 1919 Lahore 111**

BROADWAY, J.

*Basanta Mal—Plaintiff—Appellant.*

v.

*Municipal Committee, Hoshiarpur—Defendant—Respondent.*

Second Appeal No. 1291 of 1917, Decided on 2nd August 1918.

Punjab Municipal Act (3 of 1911), Ss. 195 and 225—Not preferring appeal under S. 225 does not bar right to sue for injunction.

The mere fact that a person prefers not to appeal against the orders of a Municipal Committee to the commissioner under S. 225, does not deprive him of the right to bring a suit for an injunction restraining the committee from taking certain action. [P 112 C 1]

*Umar Bakhsh—for Appellant.*

*Sohan Lal—for Respondent.*

**Judgment.**—The facts of this case are as follows: On 11th June 1907 Basanta



Mal filed an application with the Municipal Committee, Hoshiarpur, asking for permission to raise his thara and cut down a tree. On 12th March 1908 sanction was accorded, but a rider was added that he was not to build over the thara. Basanta Mal had not asked to be allowed to do so. On 6th February 1911 Basanta Mal made an application to be allowed to construct a chappar over this thara. This reached the Municipal office on 8th February 1911, but no orders were passed on it up to 2nd May 1911. On that date it was discovered that the chappar had been erected. Thereupon the committee issued a notice to Basanta Mal calling on him to remove the chappar and the kaula or supports or pillars on which it rested. Basanta Mal protested and tried to get the committee to review its orders but in vain, and finally a criminal complaint was lodged against him. He then brought this suit for an injunction. The trial Court granted him a decree, but the learned District Judge has dismissed his suit on the ground that the erection of the "kaula" was not justified, and also that as he had failed to appeal to the Commissioner he ought not, even if he were entitled to it to be given a decree. Basanta Mal has accordingly preferred this second appeal through Sheikh Umar Bakhsh and I have heard Bakhshi Sohan Lal for the committee. No doubt in *Municipal Committee, Ambala v. Mahander Singh* (1) it was held that it was necessary to exhaust the remedies provided by the Act, but in the present case I am unable to see to that that decision is in point. There there was a demand from the committee for a refund of octroi; here there is a claim that the committee should refrain from taking certain action.

I am also unable to understand the difference that the learned District Judge makes between the "chappar" and the "kaula." The "kaula" are the supports to the "chappar" and an integral part of it. In my opinion the plaintiff is entitled to the decree asked for, and I accordingly accept this appeal with costs and, setting aside the order of the lower appellate Court, restore the decree of the learned Munsif. The injunction will not however take away any statutory rights the committee may now or at any future time possess or be given.

R. M./R.K.

*Appeal accepted.*

(1) [1911] 38 P. R. 1911=3 I. C. 1000.

## A. I. R. 1919 Lahore 112

RATTIGAN, C. J.

*Ram Dhan Das and others*—Plaintiffs—Appellants.

v.

*Ramji Das and others*—Defendants—Respondents.

Second Appeal No. 2616 of 1917, Decided on 4th March 1919, from decree of Dist. Judge, Ferozepore, D/- 13th August 1917.

(a) **Hindu Law—Debt — Manager—Necessity—Family benefit will not be presumed.**

There is no presumption that a debt contracted by the managing member of a joint family business was contracted for the benefit of the family or for the family business. [P 112 C 2; P 113 C 1]

(b) **Hindu Law—Debt—Family business — Debt contracted by adult members is not binding on minor members if benefit not proved.**

A debt contracted by the adult members of a joint Hindu family which carries on trading business is not binding upon the minor members of the family in the absence of proof that it was incurred for the benefit of the minors.

[P 113 C 1]

*Muhammad Rafi for Muhammad Shafi*—for Appellants.

*Monohar Lal and Shammar Chand*—for Respondents.

**Judgment.**—The sole question in this appeal is whether an agreement entered into by two adult members of a joint Hindu family that carried on trading business is binding upon the minor members of the family, on the ground that the two executants of the written agreement were the managers of the trading business in question. This agreement was in the nature of a composition with certain alleged creditors of the firm, but the finding of the District Judge on appeal is that

"there is no proof whatsoever of the nature of the debts alleged to be due to the said creditors beyond the vague evidence of one Baziz and two Dalals,"

and that plaintiffs upon whom the onus rested have failed to prove in any event that the debts were contracted by the managers in the ordinary course of business and were for the benefit of the joint family or the joint family business. Upon this finding of fact it is obvious that the minor members of the family, who were not themselves parties to the agreement, cannot be bound thereby. As pointed out in *Ganpat Rai v. Munni Lal* (1), there is no presumption that a debt contracted by the managing member of a joint family business was contracted for the benefit of

(1) [1912] 34 All. 135=13 I. C. 34.



the family or for the family business and in the absence of proof of the existence of the debts and that they were incurred for the benefit of the minors and of the minors' firm, the learned District Judge was right in holding that the agreement was in no way binding upon the minors. The result therefore is that the haveli and the two shops, which were the subject-matter of the agreement, cannot be decreed to the plaintiffs inasmuch as it is the minors and their mother who are in possession thereof. The suit has been rightly dismissed and I now dismiss this appeal with costs.

R.M./R.K.

*Appeal dismissed.***A. I. R. 1919 Lahore 113 (1)**

SHAH DIN, J.

*Shib Ram—Defendant—Appellant.*

v.

*Magsum Ali Khan and another — Plaintiffs—Respondents.*

Second Appeal No. 2127 of 1917, Decided on 4th June 1918, from decree of Dist. Judge, Ambala, D/- 7th May 1917.

Punjab Pre-emption Act (1 of 1913), S. 15 (c)—Rupar is divided into sub-divisions within S. 15.

Rupar is divided into well-recognized pattis which are "sub-divisions" within the meaning of S. 15 (c) secondly. [P 113 O 2]

*Nanak Chand—for Appellant.*

**Judgment.**—The facts of this case are very fully given in the judgment of the learned District Judge and it is unnecessary to repeat them here. The first question for decision is whether Rupar is divided into pattis, as alleged by the plaintiffs, and those pattis are "sub-divisions" within the meaning of S. 15 (c) secondly of the Punjab Pre-emption Act. A reference to the plaint will show that the plaintiffs based their suit expressly on the ground that Rupar was divided into pattis, that the land in suit was situate in one of these pattis called patti Rajputan, that the vendee had no land in the said patti and that therefore the plaintiffs had a superior right of pre-emption in the land in suit. In his jawab dawa the vendee did not deny that Rupar was divided into pattis, but pleaded that he was landowner in patti Rajputan as well as the plaintiffs and that therefore the plaintiffs' alleged right of pre-emption was not superior to his. He made the same admission as to the existence of pattis in Rupar in his statement in Court, though he added that the pattis had been

fixed only for fiscal purposes. There he was quite wrong, as a reference to the statement of proprietors at the foot of the pedigree table of the Settlement of 1888 would show that although there were no pattis in Rupar before, in the course of the said Settlement it was divided into four pattis, namely, Patti Rajputan, Patti Araian, Patti Kalalan and Harchahar Patti. The very names of the pattis show that they were not fixed merely for fiscal purposes, but that they represented homogeneity of descent of the proprietors included in one patti, whatever the case may be as to the areas of the pattis in question. In connexion with this question, counsel for the vendee has relied on *Waryam Singh v. Mahtab Singh* (1) but that decision, which relates to a newly founded Chak No. 224 in the Lyallpur Colony, has no bearing whatever on a case like the present.

In view, then, of the pleadings of the parties and of the statement of the proprietors in the Settlement of 1888, it must be held, as has been held by the District Judge, that Rupar is divided into well recognized pattis which are "sub-divisions" within the meaning of S. 15 (c) secondly of the Punjab Pre-emption Act. The District Judge has found as a fact that the vendee had no land in Patti Rajputan prior to the sale in dispute; and it follows that the plaintiffs' right of pre-emption is superior to that of the vendee. The appeal fails and is dismissed with costs.

R.M./R.K.

*Appeal dismissed.*

(1) [1915] 21 P. R. 1915=26 I. O. 433.

**A. I. R. 1919 Lahore 113 (2)**

RATTIGAN, C. J.

*Ghungar Mal—Plaintiff—Appellant.*

v.

*Chandar Shankar—Defendant—Respondent.*

Second Appeal No. 3131 of 1917, Decided on 24th January 1919, from decree of Dist. Judge, Ambala, D/- 25th July 1917.

Religious Endowment—Defendant exercising all rights of management of temple—No misconduct on his part—He cannot be evicted.

In a suit for a declaratory decree and for an injunction in respect of a temple, it appeared that since the death of his father the defendant had been exercising all the rights of management of the temple, such as leasing and receiving the rent of shops, collecting subscriptions for the temple, residing on the premises and conducting



the worship of the gods, paying Municipal taxes, etc.:

*Held*: (1) that the Courts were fully justified in drawing the inference that the community as a whole had accepted the defendant as the successor of his father.

(2) that since the defendant had not been guilty of any such misconduct as would justify his eviction from the temple or his deprivation of its management, the plaintiff's suit was rightly dismissed and no second appeal was competent. [P 114 C 1]

*Tek Chand*—for Appellant.

*Gokal Chand Narang*—for Respondent.

**Judgment.**—Upon further consideration and having regard to the facts as proved in the first Court, I do not think any second appeal lies. The lower Courts are agreed that upon the death of the defendant's father, which is stated to have occurred in 1911, the defendant succeeded as manager of the temple and has since then been exercising all the rights of management with the tacit consent and acquiescence of the Sud community. As the first Court points out, he has been leasing and receiving the rent of the shops, collecting subscriptions for the benefit of the temple, been residing on the premises and conducting the worship of the gods, paying Municipal taxes and corresponding with the Municipality in all matters relating to the temple. From these facts I consider the Courts were fully justified in drawing the inference that the community as a whole had accepted the defendant as the successor of his father. The lower Courts are also agreed that the defendant has not been guilty of any such misconduct as would justify his eviction from the temple or his deprivation of its management. Upon these findings plaintiffs have no cause of action against the defendant and their suit was rightly dismissed. I accordingly reject this appeal with costs.

R.M./R.K.

*Appeal rejected.*

### A. I. R. 1919 Lahore 114

SHADI LAL AND MARTINEAU, JJ.

*Lakhera and others*—Plaintiffs—Appellants.

v.

*Mahji and others*—Defendants—Respondents.

Second Appeal No. 2133 of 1915, Decided on 13th February 1919, from decree of Dist. Judge, Lyallpur, D/- 1st April 1915.

Limitation Act (9 of 1908), Art. 144—*Shamlat*—Partition of—Continuous posses-

sion for over 12 years—Suit for recovery of possession is barred.

Plaintiffs sued for recovery of a plot of land which on partition of the shamlat had been awarded to the defendants. It appeared that the partition proceedings began in 1896, and in 1898 the ancestor of the plaintiffs applied that he should be awarded the shamlat proportionate to the land attached to his well. This application was dismissed on 28th May 1899 and the shamlat area was awarded to the defendants. The Assistant Collector sanctioned the partition on 12th December 1899 and effect was given to it in January 1900:

*Held*: that the defendants having obtained possession of the area in dispute in December 1899, their possession was adverse to the plaintiffs and had ripened into ownership before the present suit was brought. [P 115 C 1]

*Bahadur Chand*—for Appellants.

*Tek Chand and Ram Chand Manchanda*—for Respondents.

**Judgment.**—This appeal arises out of an action brought by the plaintiffs for the recovery of a plot of land which on partition of the shamlat was awarded to the defendants in 1899. The Courts below have concurred in holding that limitation operates as a bar in the way of the plaintiffs; and the only ground for determination is whether the suit is barred by time. The statement of the patwari shows that the partition proceedings began in 1896, and it is beyond dispute that in 1898 Nathu, the ancestor of the plaintiffs, made an application to the Revenue Officer that he should be awarded the shamlat proportionate to the land attached to Sultanwala well. This claim was resisted by the defendants, who asserted that they had purchased from the plaintiffs not only the khawat land attached to the well but also the shamlat appertaining thereto. Nathu's application was dismissed on 28th May 1899, and the shamlat area was awarded to the defendants. The Assistant Collector sanctioned the partition on 12th December 1899 and it appears that effect was given thereto in January 1900. The learned District Judge holds that the plaintiffs' cause of action for possession arose in December 1899; and that the present suit, which was not instituted until 25th March 1912, is barred by time. Mr. Bahadur Chand for the appellants contends that the instrument of partition was not prepared until 1900, and that it specified 1st August 1900 as the date on which the partition was to take effect. It appears that one Nasir preferred an appeal against the order o-



the Revenue Officer sanctioning the partition, and that that appeal was dismissed by the Collector on 1st August 1900. The Assistant Collector accordingly mentioned the date of the dismissal of the appeal as the date from which the partition was to take effect, but it is perfectly clear that Nasir's appeal had nothing whatever to do with the right to the shamilat of Sultanwala well, and consequently had no bearing upon the matter in controversy between the parties, which had been settled in May 1899.

The learned pleader invokes the provisions of S. 122, Punjab Land Revenue Act, which provides that a person, to whom any land was allotted in proceedings for partition, may apply to the Revenue Officer within three years from the date recorded in the instrument of partition as the date from which partition was to take effect, and that the Revenue Officer shall on that application direct possession to be delivered to the applicant. Now, it is beyond dispute that no land was allotted to the plaintiffs on partition, and they could not therefore ask the Revenue Officer to take action under the aforesaid section. It seems to us that so far as the parties to the present litigation are concerned, the partition proceedings were concluded in December 1899, and that the defendants obtained possession of the area in dispute in that month or, at any rate, in succeeding month, when according to the report of patwari partition was carried into effect. Their possession was clearly adverse to the plaintiffs and had ripened into ownership before the present suit was brought. We accordingly affirm the decision of the lower appellate Court and dismiss the appeal with costs.

R.M./R.K. *Appeal dismissed.*

### A. I. R. 1919 Lahore 115

DUNDAS, J.

*Maula Bakhsh and others*—Defendants—Appellants.

v.

*Dasondhi and others*—Plaintiffs—Respondents.

Second Appeal No. 558 of 1919, Decided on 13th June 1919, from decree of Dist. Judge, Hoshiarpur, D/- 3rd February 1919.

**Custom (Punjab)—Village—Common land—Appropriation by small section for particular use is not permissible.**

It is not permissible to convert a takia built on shamilat into a mosque thereby diverting the

property from the purpose for which it was given and depriving a considerable section of the community of its use. [P 116 C 1]

*Muhammad Shafi and Fazal-i-Hussain*—for Appellants.

*Tek Chand*—for Respondents.

**Judgment.**—Plaintiff in this case sued for an injunction to restrain certain Musalmans of Basti Hast Khan in the Hoshiarpur District from building a pacca mosque on a plot of land in the village abadi described as a takia. The first Court found first that the Hindus of the village had never actually used this takia for their marriage parties; secondly, that the plaintiffs who suffered no special damage had no locus standi to object to the completion of the mosque; and thirdly, that as a matter of fact, the pre-existing platform had been used as a place of prayer. The District Judge differed from these findings. He concluded that the takia was not a mosque, although the spot may have been used for the purposes of janaza prayers. He recorded a finding that

"there is ample evidence in the present case to the effect that this takia is used by persons other than Musalmans,"

and lastly he considered that the conversion of this takia into a mosque would certainly affect the plaintiff whose house is close by and whose cattle are tethered on the land in front. The learned District Judge was much influenced by the decision of the Chief Court in a very similar case, *Sawan v. Mehr Din* (1) (Civil Appeal No. 3139 of 1916, decided on 6th May 1918). The defendants have preferred a second appeal.

Ground 1 of appeal merely points out that Mahomedans formerly owned the entire village and it is only in recent times that a small portion in fact only a one-twelfth share has been sold to Hindus. This way of putting it is however somewhat misleading inasmuch as it would appear that the number of Mahomedans is small. In fact there are only some four houses of Mahomedans as opposed to some 40 houses inhabited by Hindus and the greater number of the population are evidently Hindus. Then it is pointed out that the offer of Dasondhi, plaintiff, to provide a piece of ground for the mosque elsewhere is vague as he does not own anything except a share in the shamilat. This however does not seem to be very material. It is quite evident that

(1) [1917] 45 I. O. 969.



the conversion of this takia into a mosque will certainly be a nuisance to the plaintiff, Dasondhi, but he could not probably object to it on that ground alone. The appellants' great difficulty is the finding of the learned District Judge that this takia has been used from time to time as the resting place for the marriage parties of Hindus. This is a finding of fact and the learned counsel for the appellants can only get round this difficulty by questioning the fact that the District Judge did come to any such finding opposed to the conclusion of the first Court. There can however be no doubt as to what the learned District Judge means and there is a very considerable amount of evidence on the record that many marriage parties of which the names and occasions are given, have used this takia. This fact must be regarded as now beyond question and it disposes of the contention that the spot can be regarded as mosque. As indeed has been pointed out by the respondents, this place is described in the settlement as shamilat, a takia occupied by Daula Shah and others, and there is no hint that the call to prayers is ever given here or that there is any imam or muttawali. Now taking the finding that this takia is used by all sections of the community and is not a mosque, it is evident that those persons who would be deprived of the use of this piece of common land have a right to object to its entire appropriation by the smaller section, vide Ss. 225 and 227, Rattigan's Digest. I have been referred to one or two old cases in which a cosharer has built a house on some portion of a village common land, but its demolition has been refused, but these cases are not entirely in point. The matter has been most fully discussed in the recent Chief Court judgment quoted above and the conclusion arrived at that it is not permissible to convert a takia into a mosque, thereby diverting the property from the purpose for which it was given and depriving a considerable section of the community of its use. The facts in that judgment were on all fours with the facts in the present case, and the decision in this case must follow that then given which indeed on the finding that the place is not a mosque was conceded before the learned District Judge. The appeal is dismissed with costs accordingly.

R.M./R.K.

*Appeal dismissed.***A. I. R. 1919 Lahore 116**

SCOTT-SMITH AND BROADWAY, JJ.

*Emperor.*

v.

*Munshi Ram—Respondent.*

Criminal Appeal No. 311 of 1918, Decided on 19th October 1918, from order of Sess. Judge, Karnal, D/- 21st December 1917.

(a) Opium Act (1 of 1878), S. 5—Rules framed by Punjab Government under, R. 49 (3) (f)—Retail vendor is bound to keep correct accounts.

Under R. 49 (3) (f) of the rules framed by the Punjab Government under S. 5 the holder of a retail license for the sale of opium is bound to keep correct accounts of his daily sales.

[P 117 C 2]

(b) Opium Act (1 of 1878), Ss. 9 and 10—Illegal possession of opium even by licensed vendor is offence.

By virtue of the provisions of S. 10, in prosecutions under S. 9 of the Act it must be presumed, until the contrary is proved, that all opium for which the accused person is unable to account satisfactorily is opium in respect of which he has committed an offence under the Act. [P 117 C 2]

The accused, a licensed vendor of opium, falsified his sale accounts by showing sales in excess of the actual amount sold and was thus enabled to accumulate a certain amount of opium.

*Held:* that the accused was guilty of an offence under S. 9 (c). [P 118 C 1]

C. Bevan Petman—for Appellant.

Rama Nand—for Respondent.

**Judgment.**—The facts of this case are as follows: On 2nd November 1917, Excise Inspector Ganpat Rai examined the shop and the sale register of one Munshi Ram, son of Udham, Bania of Shahabad, who held an opium license for the retail sale of opium. It was ascertained that the sale register showed that on 31st October 1917 nine chhataks of opium had been sold. As this was an unusually large amount for a daily sale, the Inspector grew suspicious and the stock of opium in the shop was weighed and found to be 2 seers 14 chhataks and 1½ tolas. This was at 2 p. m. Rs. 5-4-9 were found in the till which represents, it is said, the price of about 1½ chhataks of opium. The books showed that the balance in hand on the evening of 1st November was 2 seers 15 chhataks 4 tolas of opium. In a corner of the shop a loose brick was noticed, which was examined and on removal exposed a hollow or niche in which 2 chhataks of opium were found. Upon this, according to Ganpat Rai, Inspector, P. W. 1, Munshi Ram stated that although he had shown 9 chhataks of opium as sold on 31st Octo-



ber, he had as a matter of fact only sold 5 chhataks and that he had shown this excess sale in order to be able to obtain more opium from the Treasury; in other words, Munshi Ram admitted definitely that he had falsified his accounts in order to be able to obtain more opium. The police were called in and subsequently the house of Munshi Ram was searched, with the result that 15 chhataks 2 tolas of opium were found in the lower storey of the house. Munshi Ram was sent up for trial under S. 9, Opium Act, and a charge was framed against him by the Magistrate under S. 9 (c), Act I of 1878, charging him with possession of 2 chhataks of opium at his shop and 15 chhataks and 2 tolas at his house and thus contravening the Act and the rules made thereunder. Munshi Ram was convicted of the charge laid against him on 30th November 1917 and sentenced to three months' rigorous imprisonment and a fine of Rs. 50 or two months' rigorous imprisonment in default.

On appeal by him against his conviction and sentence the learned Sessions Judge acquitted him on 21st December 1917, on the ground that he was admittedly a licensed vendor and under R. 40 was entitled to have in his possession any quantity of opium which he was authorised to sell and that it had not been proved that any of the opium in his possession had been purchased by him from persons other than the Government or a licensed vendor. Placing reliance on *Umesh Chunder Ghose v. Queen-Empress* (1), the learned Sessions Judge held that if a

"licensed vendor keeps an incorrect account as in this case, he cannot be convicted of an offence punishable under S. 5 of the rules inasmuch as he was not bound by the rules to keep an account."

Against this acquittal the Local Government has preferred this appeal under S. 417, Criminal P. C., and we have heard the learned Government Advocate in support of it, while Lala Ramanand has addressed us on behalf of the respondent Munshi Ram. The delay in the disposal of this appeal, which was filed on 13th May 1918, is due to the fact that it had been impossible to serve Munshi Ram with notice. The learned Government Advocate has pointed out that the Local Government has, by S. 5, Act I of 1878, been empowered to frame certain

rules, and in the exercise of those powers has, in connexion with the Opium Act, framed and duly published rules to be found in Punjab Excise Manual, Vol. 2, at p. 78. The relevant notifications are Nos. 954, dated 16th October 1916, and 6583 C and J, dated 27th March 1917. Under R. 49, sub-Cl. 3 (f), it has been declared that a licensee shall keep correctly daily accounts of sales of opium and poppy heads in such form as the Financial Commissioner may from time to time prescribe, and shall at the end of each month prepare and submit to the Collector a monthly abstract of his receipts and sales. Under this rule it was urged, and we think with force, that the holder of a retail license was bound to keep correct accounts of his daily sales.

Under S. 9, Act I of 1878 any person who in contravention of this Act or of the rules made or notified under section 5 or section 8 (c) possesses opium \* \* \* and any person who otherwise contravenes any such rule shall, on conviction before a Magistrate be liable to the punishment therein prescribed. Mr. Petman contended that in all probability what the respondent did was to show sales in excess of the actual amount sold. By so doing he was enabled to accumulate a certain amount of opium which he could sell more profitably in an illicit manner. He contended that section 10 of the Opium Act lays down that in prosecutions under S. 9, it shall be presumed, until the contrary is proved, that all opium for which the accused person is unable to account satisfactorily is opium in respect of which he has committed an offence under this Act. Further it was contended that Munshi Ram had failed to account satisfactorily for the possession of the opium in this case and that, therefore, the Court was bound to presume that Munshi Ram had committed an offence under the Act in respect of it. The record shows that *qua* the 2 chhataks found hidden in Munshi Ram's shop, Munshi Ram pleaded that he had falsified his daily accounts and *qua* the 15 chhataks 2 tolas found in his house his defence was that some enemy had placed it there. We may state at once that we are satisfied that the opium was found in the possession of Munshi Ram as deposed to by the witnesses. This being so, in our opinion, section 10 of the Opium Act

(1) [1899] 26 Cal. 571.



applies and the presumption is that Munshi Ram has committed an offence in respect of this opium, unless he can satisfactorily account for it. With regard to the 15 chhataks 2 tolas he has contented himself with a denial of its discovery in his possession, so that there is no satisfactory explanation of his possession of this amount. Nor do we consider that the explanation he has given with regard to the excess opium found in his shop can be regarded as satisfactory. In these circumstances we consider that the learned Sessions Judge was wrong in acquitting him and we must, therefore, find him guilty of an offence under S. 9 (c) of the Opium Act.

We would add further that, as contended by the learned Government Advocate, *Umesh Chunder Ghose v. Queen Empress* (1) is distinguishable inasmuch as the rules framed under section 5 of the Bengal Government are different from the rules framed under that section by the Punjab Government. As pointed out by Counsel in the Calcutta case, the corresponding rule did not require the keeping of daily accounts. This matter was relegated to one of the conditions in the license itself. Here under rule 49 (3) (f) every holder of a retail license is required by the rule itself to maintain correct daily accounts and S. 9 of the Opium Act provides that any person who contravenes in any way any rule and notified under S. 5 commits an offence punishable under that section. On Munshi Ram's own showing he has falsified his accounts and thus rendered himself liable to punishment under S. 9 for contravention of rule 49 (3) (f). He was however, not specifically charged with that offence and we do not consider it necessary to direct a re-trial at this stage. We accordingly accept this appeal and convict Munshi Ram of an offence under S. 9 (c), Act I of 1878 and sentence him to the imprisonment already undergone and to a fine of Rs. 100 or in default three months' rigorous imprisonment. We do not think it necessary to send him back to jail at this stage, as it appears that he had served out 23 days of the term imposed on him by the Magistrate before he was released under the orders of the Sessions Judge.

R.M./R.K.

*Appeal accepted.***A. I. R. 1919 Lahore 118**

SHADI LAL AND LEROSSIGNOL, JJ.  
*Rangi Ram and others—Plaintiffs—*  
*Appellants.*

v.

*Mehr Singh and others—Defendants—*  
*Respondents.*

Second Appeal No. 2284 of 1915, Decided on 27th February 1919, from decree of Addl. Dist. Judge, Lahore, D/- 16th July 1915.

**Punjab Pre-emption Act (1 of 1913), S. 3 (5)—Right of pre-emption can be exercised as to sale in decree for specific performance of contract.**

A sale in execution of a decree for specific performance of a contract to sell is subject to the right of pre-emption. [P 119 C 1]

Defendant 2 obtained a decree for specific performance of an agreement to sell certain land against defendant 1 and got a conveyance executed by him. Plaintiff thereupon sued to recover possession of the land by pre-emption :

*Held* : that inasmuch as the decree in execution of which the sale was effected was not a money decree the plaintiff's suit was not barred. [P 119 C 1]

*Tek Chand for Sheo Narain and Tirath Ram—for Appellants.*

*Durga Das—for Respondents.*

**Judgment**—The facts of the case out of which this second appeal arises are as follows : Mehr Singh, defendant 1, agreed to sell a house to Durga Das, defendant 2, but on the failure of the former to complete the contract defendant 2 sued for specific performance and obtained a decree. Having obtained a decree he approached the Court with a tender of the sale-price and prayed that defendant 1, should be forced to execute the conveyance. With this order defendant 1 complied and the sale by Mehr Singh was perfected. Thereupon plaintiffs sued to pre-empt and the Courts below have held that inasmuch as the sale was carried out in compliance with the orders of the Court the suit to pre-empt is barred under S. 3 (5), Punjab Pre-emption Act of 1913.

The plaintiffs have come up in second appeal to this Court and on their behalf it is urged that the sale was completed in execution of a decree of the civil Court but inasmuch as that decree was not a decree for money, S. 3 (5) of the Act does not bar the suit. For the respondents it is contended that the sale was carried out under an order of the civil Court. In our opinion the appeal must succeed for the sale was carried out obviously in execution of the decree of the civil Court



and not in execution of an order. Quite apart from the fact that an order between the parties to a civil suit regarding execution amounts to a decree, it is quite clear that the sale was completed in execution, of the decree and inasmuch as that decree was not a decree for money the suit to pre-empt is not barred. For these reasons we accept the appeal reverse the finding of the Courts below and remand the case under O. 41, R. 23, Civil P. C., to the first Court for decision on the other points in the case. Stamp on appeal to be refunded. Other costs to follow the final event.

R.M./R.K. *Appeal accepted.*

### A. I. R. 1919 Lahore 119 (1)

LEROSSIGNOL, J.

*Municipal Committee, Sonapat—Defendant—Appellant.*

v.

*Dinu—Plaintiff—Respondent.*

Second Appeal No. 481 of 1917, Decided on 30th May 1918, from decree of Dist. Judge, Karnal, D/- 21st June 1916.

Punjab Municipal Act (1911), S. 121—Question as to whether business is offensive is to be decided by Municipal Committee—Court cannot interfere unless decision is unreasonable.

The question whether a certain business is offensive within the meaning of S. 121 is to be decided by the Municipal Committee and unless the Committee's action is wanton, unreasonable or tainted with mala fides, the civil Courts have no power to interfere with its decision.

[P 119 C 1]

*Mohsin Shah—for Appellant.*

*Badraddin Kureshi—for Respondent.*

**Judgment.**—The Courts below are agreed in giving plaintiff an injunction against the appellant Committee prohibiting it from interference with the plaintiff's business of skin drying. The Courts below hold that the business does not give rise to offensive or unwholesome smells. In so doing, they display little knowledge of hygiene, but worse than that they prefer the evidence of ignorant persons to that of experts; further they substitute for that of the Committee their judgment whether the business is offensive. That is a matter for the decision of the Committee and unless the Committee's action is wanton, unreasonable or tainted with mala fides, the civil Courts have no power to interfere. In this case the action of the Municipal Committee is based on expert advice and knowledge and is obviously a step in the right direction,

although it may not be appreciated by the very persons who will derive most benefit from it. I accept the appeal and dismiss the plaintiff's suit with costs throughout.

R.M./R.K.

*Appeal accepted.*

### A. I. R. 1919 Lahore 119 (2)

MARTINEAU, J.

*Kania Lal and others—Plaintiffs—Appellants.*

v.

*Narain Singh and others—Defendants—Respondents.*

Misc. Second Appeal No. 945 of 1918, Decided on 11th June 1918, from order of Dist. Judge, Multan, D/- 11th December 1917.

(a) Civil P. C. (1908), O. 41, R. 23—Parties well aware of question in dispute—Whole evidence produced and discussed in judgment—Case should not be remanded although issue is not rightly framed.

Where the parties are well aware of the question in dispute and produce their whole evidence and it is duly discussed in the judgment of the first Court, there is no need of remanding the case for further inquiry although the issue is not rightly framed. [P 120 C 1]

(b) Civil P. C. (1908), O. 41, Rr. 23, 25 and 28—Case decided on merits cannot be remanded under R. 23—If further inquiry is necessary Court should proceed under either R. 25 or R. 28.

Where a case has been fully dealt with and decided on the merits, it is illegal to remand it under R. 23, O. 41, if any further inquiry is necessary, the proper course to follow is to proceed either under R. 25 or R. 28 of the Order.

[P 120 C 1]

(c) Civil P. C. (1908), O. 1, R. 3—Dispute as to right of irrigation from private watercourse of canal—No relief against Government—Government is not necessary party.

In a case of dispute as to the right of irrigation from a private watercourse of canal where no relief is asked against the Government, the latter is not a necessary party. [P 120 C 2]

(d) Northern India Canal and Drainage Act (1873), Ss. 20 and 23—Permanent right of irrigation cannot be conferred without proceeding under S. 20 or S. 23.

The canal authorities have no power to confer upon a person a permanent right of irrigation without proceeding either under S. 20 or S. 23.

[P 120 C 2]

*Hargopal—for Appellants.*

*Durga Das—for Respondents.*

**Judgment.**—The plaintiffs sue for an injunction to restrain defendant 1 from irrigating his lands in Mauza Chaddar from a certain watercourse known as the Kanshi Ramwali Kassi, the Chief Court having decided in 1889, in a suit between the plaintiffs and the defendant's father, that the latter had no right to



irrigate his lands from that watercourse. The defendant's case is that he was authorised by the Canal Department to irrigate his land from the said watercourse, having been given permission by Mr. Wilson, Executive Engineer, in 1907. He also pleaded limitation. The first Court framed two issues, (1) whether the defendant was not bound by the Chief Court's decision of 1889, and (2) whether the suit was barred by time. It decided both issues in the plaintiff's favour and gave them a decree.

On appeal the District Judge remanded the case for retrial, pointing out that issue 1 did not cover the question in dispute, and that what had to be determined was whether the Canal Department had given the defendant permission to irrigate his land from the watercourse above mentioned, and whether the plaintiffs have a right to question the authority of that Department. The plaintiffs appeal from the order of remand.

The lower appellate Court is right in saying that issue 1 was not properly framed as it did not cover the point in dispute. Nevertheless there was under the circumstances no need to remand the case. Although the issue was wrongly drawn, the parties were well aware that the question in dispute was whether the Canal Department had given permission to the defendant to irrigate his lands at Chaddar from the Kanshi Ramwali Kassi and the defendant produced his evidence on the point, adjournments being granted to enable him to produce it. The Subordinate Judge also fully discussed the question in his judgment, and he found that Mr. Wilson had only given a temporary permission to the defendant to irrigate his lands at Chaddar from the watercourse in dispute for one harvest that it was not proved that a permanent grant had been made that the Canal Officers could not upset the decisions of the Chief Court, and that no action had been taken, such as is laid down in the Canal Act, for transferring the right in the watercourse to the defendant.

If any further inquiry had been thought necessary, the lower appellate Court could have directed it to be made under O. 41, R. 25 or 28, Civil P. C. It was not right in remanding the case under R. 23, for a retrial, when the first Court had dealt fully with the case and decided it on the merits and had not disposed

of the case on a preliminary point. The lower appellate Court has suggested that Government should be made a party in the case, but I fail to see the necessity for this. The watercourse does not belong to the Government, and no relief is asked for against Government, nor was any plea of non-joinder taken in the first Court. The lower appellate Courts' order cannot stand.

There is no necessity to remand the case to that Court for re-decision, as the defendant's plea of having got permission from the Canal Department to irrigate his land from the watercourse in question is no legal answer to the claim. As pointed out in the judgment of the first Court no action was ever taken under S. 23, Canal Act for the transfer of the watercourse to the defendant, nor was any action taken under S. 20. The Canal Department would not have been competent to confer on the defendant rights of irrigation from the watercourse in dispute unless it proceeded under one of those sections, so that even supposing that it gave the defendant permission to irrigate his lands from the watercourse such permission would have no legal effect.

The plaintiffs would not be bound by it and they are entitled to the injunction asked for. As regards limitation the learned counsel for the respondent does not contend that the suit is barred. The interference with the plaintiffs' right of irrigation is a continuing wrong, as both the Courts below have held, so that no question of limitation arises. I accept the appeal, set aside the order of the lower appellate Court, and restore the decree of the first Court. The respondent Narain Singh will pay the appellants' costs throughout.

R.M./R.K. *Appeal accepted.*

**A. I. R. 1919 Lahore 120**

SHAH DIN, J.

*Dasa—Defendant—Appellant.*

v.

*Mt. Hiran—Plaintiff—Respondent.*

Second Appeal No. 579 of 1917, Decided on 30th May 1918, from decree of Dist. Judge, Hoshiarpur, D/- 9th October 1916.

(a) Custom (Punjab)—Gift to stranger—Donee dying issueless—Gifted property does not revert to family of donor.

Where land is gifted to a perfect stranger who is not in any way related to the family of the



donor, there can be no reversion of the land gifted to the donor's family on the failure of the donee's line. [P 121 C 1]

(b) **Right of suit**—Person without locus standi cannot question validity of gift.

A person who has no locus standi to question validity of a gift, is precluded from disputing its validity on any ground whatever. [P 121 C 2]

*Tek Chand*—for Appellant.

*Sohan Lal*—for Respondent.

**Judgment.**—A preliminary point is urged by the pleader for the respondent in this case to the effect that since the original donee Sobha's line has become extinct, the land in suit reverts to the line of the donor and therefore the present appellant, Dasa, who is brother of Sobha, donee has no locus standi to prosecute this appeal. The record however shows that Sobha, donee, was a perfect stranger and is not proved to have been related to the family of the donor; hence the principle laid down in *Nihala v. Rahmatullah* (1), is fully applicable to this case, and there can be no reversion of the land gifted to the donor's family. The preliminary objection is therefore overruled.

On the merits of the case it seems to me that the District Judge was entirely wrong in raising for the first time the question of the factum of the gift in favour of Sobha and in holding that no gift as a matter of fact had ever taken place. The gift was made by Larja to Sobha by a registered deed as far back as 20th February 1909 and mutation was sanctioned in accordance with the gift on 12th May 1909 in favour of the donee. Subsequently there was litigation between the donor and the donee over the gift and the donee obtained a decree against the donor in respect of the land gifted on 18th March 1910. The plaintiff never questioned the factum of the gift; all that he contended was that the gift was invalid in her presence. On this point the District Judge has found against the plaintiff, holding that she as a widow had no locus standi to question the validity of the gift. In these circumstances it was wrong on the part of the District Judge to set up a new case for the plaintiff and to hold that as a matter of fact no gift had been made by Larja in favour of Sobha.

As regards the question of the alleged undue influence under which the gift is said to have been made, it is clear that

(1) [1908] 187 P. R. 1908.

since the plaintiff has no locus standi to question the validity of the gift, she is precluded from disputing its validity on any ground whatever: the gift, whether it was valid or not, is a perfectly good one so far as the plaintiff is concerned. I accept the appeal set aside the judgment and decree of the District Judge and dismiss the plaintiff's suit with costs.

R.M./R.K.

*Appeal accepted.*

## A I. R. 1919 Lahore 121

BROADWAY, J.

*Jugal Kishore and another*—Objectors—Appellants.

v.

*Ishar Das and others*—Respondents.

Misc. First Appeal No. 2885 of 1917, Decided on 9th August 1918, from order of Dist. Judge, Karnal, D/- 17th October 1917.

(a) **Provincial Insolvency Act (1907), S. 49**—Auction-purchaser is not necessary party in appeal against confirmation of sale.

Where property is sold in insolvency proceedings and the sale is confirmed, the auction-purchasers are not necessary parties to an appeal against the order confirming the sale.

[P 123 C 1]

(b) **Provincial Insolvency Act (1907), S. 46 (3)**—High Court can grant leave to appeal even if refused by District Judge.

Where under S. 46 (3) the District Judge refuses to grant leave to appeal, the High Court is competent to grant such leave. [P 122 C 2]

(c) **Provincial Insolvency Act (1907), S. 36**—Several objections to attachment and sale must be separately decided.

Where several persons file objections to the attachment and sale of property in insolvency, it is the duty of the Court to consider these objections separately, as the failure to do so may result in a serious miscarriage of justice.

[P 122 C 2]

*Manohar Lal*—for Appellants.

*Moti Sagar, Roshan Lal and Gokal Chand Narang*—for Respondents.

**Judgment.**—The facts of the cases giving rise to this and to the connected Appeal No. 2886 of 1917 are briefly as follows:

One Bichha Lal was adjudicated an insolvent and the Official Receiver apparently attempted to attach and bring certain properties to sale. This action resulted in a crop of objections, the objectors being: (1) Bichha Lal's brother, Baldeo Sahai, (2) Bichha Lal's sons, Jugal Kishore and Sher Singh, (3) Jugal Kishore alone, (4) The wives of Jugal Kishore and Sher Singh and (5) Data Ram, purchaser of a house from Baldeo Sahai. All these ob-



jections were disposed of by one order dated 17th October 1917, and with the exception of one objection lodged by Data Ram all the objections were dismissed. Against this order appeals have been filed by Baldeo Sahai and Jugal Kishore and Sher Singh through Mr. Manohar Lal, who made the Official Receiver respondent at the outset for whom Mr. Moti Sagar has appeared.

At the last hearing the appellants applied to have certain persons, who had purchased the properties subsequent to the order under appeal, brought on to the record as respondents and this was done. These added respondents were represented before me to day by Mr. Roshan Lal and Mr. Gokal Chand Narang, and an objection was taken on their behalf to the effect that the whole appeal was barred on the ground that as they were necessary parties they ought to have been made respondents from the very commencement reference being made to O. 1, R. 10, Civil P. C. Upon this objection Mr. Manohar Lal stated that they were not necessary parties and asked that their names might be struck off and the application, dated 4th July 1918, be regarded as withdrawn. This request was granted and these auction-purchasers were removed from the list of respondents. It will be as well to dispose of them at once as their counsel claim costs. I think they are clearly entitled to costs and the appellants must therefore pay their costs in this Court.

Mr. Moti Sagar then on behalf of the Official Receiver raised two objections. The first was that the auction-purchasers being necessary parties and not having been impleaded, the appeal could not proceed. He referred me to O. 21, R. 92, Civil P. C., as an analogous case, in support of his contention. I am however unable to agree. The order appealed against was passed on 17th October 1917. The appeal against that order was filed in this Court on 1st November 1917. The sale of the properties was confirmed subsequent to the passing of the order appealed against and before the receipt of my order staying further proceedings. The sale of these properties appears to have been confirmed with considerable speed, and I am unable to see that the auction-purchasers can be regarded as necessary parties to the appeal.

The next objection taken by Mr. Moti Sagar was that the appeal was not com-

petent because the appellants had asked for leave to appeal under S. 46 (3), Insolvency Act, which leave had been refused by the District Judge. It was contended that no appeal lay from such refusal and that inasmuch as this Court had only concurrent jurisdiction in granting leave to appeal, the appeal failed. In reply to this Mr. Manohar Lal cited *Madhu Sudan Pal v. Partati Sundari Dassya* (1), a decision of a Divisional Bench of the Calcutta High Court, in which it was specifically held that when leave under this section had been refused by the District Judge, the High Court was competent to grant it. No authority has been cited opposed to this and I see no reason for differing from the views therein expressed. I accordingly hold that I have power to grant the leave, and after hearing counsel I confirm the order passed when I admitted the appeal and granted the leave prayed for.

Turning now to the order under appeal, it will be seen that it is an extraordinarily confused one. No doubt, these proceedings are of a summary nature, but the summary manner in which the learned District Judge (Lala Diwan Chand) has dealt with these objections is, in my opinion, wholly unwarranted. The order is a brief one although it disposes of so many objections. The objections filed by Jugal Kishore on 4th September 1917 and 10th October 1917 were to the effect that the properties therein referred to were his exclusive properties. These objections have not been disposed of at all. No reference has been made to them in any way and apparently they have been dismissed in the general dismissal, but without any discussion, where the learned District Judge says that

"the net result is that direct descendants of Bichha Lal have not proved the validity of their objections, which are dismissed with costs."

It was clearly the duty of the Court below to consider these objections separately and the failure to do so may have resulted in a serious miscarriage of justice. His decision with regard to the objections filed by Jugal Kishore and Sher Singh as to the ancestral nature of the property, though somewhat inadequately dealt with need not be considered any further, for *prima facie* the property would be liable. Mr. Manohar Lal did not seriously press this point. With regard to Baldeo



Sahai's objections, the conclusions arrived at are difficult to understand and Mr. Moti Sagar practically had to admit that it would necessitate a long dissertation on the facts of the case, to be deduced from the documentary and oral evidence on the record, to render it at all comprehensible. Baldeo Sahai's objections related to certain agricultural land, a house in the Dhobi Mohalla, a haveli and a baithak. It may be that the ultimate conclusion arrived at by the learned District Judge is the correct one, but from what he has written it is difficult to say. The remaining objections are not the subject of appeal and need not be considered. In my opinion, the order complained of is faulty in the extreme and I accordingly accept the appeal so far as Jugal Kisbore's objections as to exclusive ownership are concerned and as to Baldeo Sahai's objections, the case will go back to the District Judge who will consider these objections and write a proper and intelligible order concerning them.

Mr. Moti Sagar contended that the objectors should not be allowed any further opportunity to produce evidence in support of their objections on the ground that they had closed their cases in the Court below. If, as a matter of fact, this contention is correct the learned District Judge will not allow them further opportunity. If it is not correct, then the learned District Judge will exercise his discretion in a judicial manner. The costs in this Court, so far as the Official Receiver is concerned, will follow the event.

R.M./R.K.

*Appeal accepted.*

### A. I. R. 1919 Lahore 123

SHADI LAL, J.

*Khem Chand*—Plaintiff — Petitioner.

v.

*Mohammad Yar and others* — Defendants—Opposite Parties.

Civil Revn. Petn. No. 609 of 1918, Decided on 11th January 1919, against decree of Senior Sub-Judge, First Class, Jhang, D/- 13th February 1918.

(a) Civil P. C. (1908), S. 115 — Findings based on conjectures cannot be accepted.

Findings of fact based on conjectures and not supported by evidence on the record cannot be accepted in revision. [P 123 C 2]

(b) Civil P. C. (1908), O. 41, R. 27 — Additional evidence.

An appellate Court is not authorized by law to admit additional evidence in the absence of reasons contemplated by law. [P 123 C 2]

(c) Practice—Judgment—Court must bear in mind pleadings—Judgment based on misconception of case cannot stand.

A Court should bear in mind the pleadings of the parties and a judgment based on an entire misapprehension of the case set up by a party cannot be allowed to stand. [P 121 C 1]

*Mukand Lal Pari*—for Petitioner.

*Nanak Chand*—for Opposite Parties.

**Judgment.**—This was an action for the recovery of a certain sum of money on account of principal and interest due on a bond dated 26th August 1912. The Munsif Khan Ahmed Khan, while reducing the rate of interest mentioned in the bond held that the document was for consideration; and consequently he decreed the claim to the extent of the principal sum and interest thereon at the rate of 12 per cent per annum. The plaintiff appealed to the Subordinate Judge claiming that interest as stipulated in the bond should be allowed to him; and the defendant preferred cross-objections praying that the suit be dismissed in toto. The learned Judge has held that the consideration for the bond in suit as well as that for the two bonds executed in favour of the plaintiff's father and brother respectively was paid to the defendants in lieu of the rent due to them by another brother of the plaintiff on a lease granted to him for a period of 20 years and that nothing was to be paid by the defendants on the strength of these bonds and he has consequently dismissed the suit.

After hearing arguments on both sides I am of opinion that the judgment of the learned Judge proceeds almost entirely upon conjectures and does not take into account several facts which militate against the conclusion reached by him. It is to be observed that the documents, to which the plaintiff was no party, were not produced by the defendants in the trial Court; and that it was the Subordinate Judge who received them for the first time in evidence without any reason such as is contemplated by law. The judgment of the learned Judge does not show whether the alleged oral agreement relied upon by the defendants was contemporaneous with the bond in suit, and whether S. 92, Evidence Act, should in this case bar the reception of oral evidence to modify the terms of the written contract. It is beyond dispute that the bond, upon which the suit is based, was for consideration; and the plea that the



defendants were not to pay anything upon this bond as well as on the other two bonds runs counter to the terms of the documents.

The learned counsel for the petitioner points out that the interest alone on the sums advanced on the strength of the three bonds exceeds the stipulated rate of rent, and there is no reason why the creditors should agree to give up the entire principal sum advanced by them. This is no doubt a circumstance which should have been considered but the learned Subordinate Judge has made no reference to it. Further if the plea of the defendants is correct it is perfectly clear that they were not entitled to recover rent on the strength of the lease granted by them in favour of the plaintiff's brother but the learned Judge himself finds that in a suit brought by the lessee in the Revenue Court for the recovery of the value of the produce against his tenants and the defendants the latter claimed and were allowed set-off for a sum of Rs. 25 on account of the rent for one year. The Judge brushes aside this fact with the bare remark that this could not be otherwise, as the amount could not be credited towards the bond in face of the lease. Now this is an entire misapprehension of the case set up by the defendants, as pointed out above; the defendants if their version is to be accepted, were not entitled to make any claim on account of rent and no question of set-off could possibly arise.

The learned Judge has expressed no opinion upon the contention of the plaintiff that the defendants paid Rs. 3-6-0 on the strength of this bond and there can be no doubt that this allegation, if established, falsifies the plea that plaintiff was not entitled to recover any money on the bond. For the reasons stated above I accept the application for revision, and setting aside the judgment of the lower appellate Court remand the case for re-decision with reference to the foregoing remarks. The costs of this application shall be costs in the cause.

R.M./R.K.      *Application accepted.*

## A. I. R. 1919 Lahore 124

SHADI LAL, J.

*Mukandi Lal and others* — Defendants  
— Petitioners.

v.

*Pars Ram* — Plaintiff — Opposite Party.

Civil Revn. Petn. No. 906 of 1918, Decided on 22nd January 1919, against order of Small Cause Judge, Kasuali, D/- 27th September 1918.

(a) **Provincial Small Cause Courts Act (1887), S. 17** — "At the time of presenting his application" are only directory.

The words "at the time of presenting his application" used in S. 17 are merely directory and not mandatory. [P 124 C 2]

(b) **Provincial Small Cause Courts Act (1887), S. 17** — Application to set aside ex parte decree — Court is to direct whether security is to be given or deposit is to be made.

The section itself provides that it is for the Court to decide whether a deposit should be made or security given and the applicant must therefore wait for the direction of the Court as to which of the two he has to do. [P 124 C 2]

*Mukand Lal Puri* — for Petitioner.

*Kanwar Narain for Dina Nath Mehra* — for Opposite Party.

**Judgment.** — The Judge, Small Cause Court, has dismissed the application, presented by the petitioners for an order to set aside a decree passed ex parte against them, on the ground that they did not at the time of presenting the application, either deposit in Court the amount due from them or give security for the performance of the decree. Now there is some divergence of opinion among the High Courts as to whether the words "at the time of presenting his application" used in S. 17, Small Causes Courts Act, are mandatory or merely directory, but so far as this Court is concerned the matter is set at rest by the judgment of a Division Bench in *Muhammad Fazal Ali v. Karim Khan* (1), which lays down that the words are merely directory and not mandatory. The section itself provides that it is for the Court to decide whether a deposit should be made or security given and as pointed out in that judgment it follows that the applicant does not at the time of making his application know which of the two he has to do. He must therefore wait for the direction of the Court as to which he is to do.

Now in this case the learned Judge gave no such direction, and considering that the application made by one of the

(1) [1894] 108 P. R. 1894.



defendants on 27th September 1918 asked for a direction I am of opinion that the application for setting aside the ex parte decree should not have been dismissed in limine. Accordingly I accept the application for revision and setting aside the order of the lower Court direct it to decide whether the defendants should deposit the decretal amount or furnish security for the due performance of the decree and to call upon the defendants to comply with that direction. If the direction is complied with the Court should then adjudicate upon the application for setting aside the ex parte decree. I leave the parties to bear their own costs in this Court.

R.M./R.K.

*Petition accepted.***A. I. R. 1919 Lahore 125 (1)**

WILBERFORCE, J.

*Mangal Singh* — Defendant — Petitioner.

v.

*Hirda Ram* — Plaintiff — Opposite Party.

Civil Revn. No. 183 of 1918, Decided on 15th April 1918, from order of Senior Sub-Judge, Amritsar, D/. 9th November 1917.

Civil P. C. (1908), O. 41, R. 1—Appeal presented without copy of decree — Decree not framed — Appeal should be adjourned till copy is produced.

Order 41, R. 1, has no application to a case in which the original Court has omitted to frame a decree. In such a case if the appeal is presented without a copy of the decree the appellate Court should adjourn the appeal until a copy of the decree is forthcoming. [P 125 C 2]

*Badrudin Kureshi* — for Petitioner.

*Chiman Lal* — for Opposite Party.

**Judgment.**—In this case a Munsif passed a decree for Rs. 48 with the order that the decretal sheet should not be prepared until the plaintiff had produced a succession certificate which he was ordered to do within two months. No decree sheet was therefore prepared and there is no information on the record to show its preparation till about the middle of August, the original judgment being dated 24th April. Meanwhile on 15th May the defendant appealed. He stated in his grounds of appeal his inability to put in a copy of the decree sheet, but the Senior Subordinate Judge on a narrow interpretation of O. 41, R. 1, Civil P. C., dismissed his appeal as not having been properly presented. Against this order the defendant subse-

quently applied for review, putting in at the same time a copy of the decree sheet which he had obtained but this application was rejected. He now applies for revision to this Court.

It appears to me that there were many material irregularities in the procedure of the lower Courts. The decree sheet should obviously have been prepared at the time of the judgment. The Senior Subordinate Judge, considering the circumstances of the case, should also not have rejected the appeal but should have adjourned the case until a copy of the decree was forthcoming. O. 41, R. 1, Civil P. C. can have no application in a case in which the original Court has carelessly omitted to frame a decree, and the Senior Subordinate Judge should have taken immediate steps to have the omission remedied. The case therefore appears to me a fit one for interference on the revisional side and I therefore accept the application and remand the case to the Senior Subordinate Judge for disposal of the appeal on the merits. Costs to follow the result. Stamp-fee to be refunded.

R.M./R.K.

*Petition accepted.***A. I. R. 1919 Lahore 125 (2)**

SCOTT-SMITH, J.

*Mt. Jeewni* — Plaintiff — Appellant.

v.

*Mt. Misri and others* — Defendants — Respondent.

Second Appeal No. 2602 of 1917, Decided on 20th January 1919, from decree of Dist. Judge, Delhi, D/. 11th July 1917.

**Decree—Execution — Sale — Auction purchaser is in no better position than judgment debtor.**

An auction-purchaser at a sale in execution of a decree is in no better position in respect of his purchase than the judgment-debtor whose right, title and interest he has purchased. So that where a judgment-debtor owns a portion of a house which is sold in execution, the auction-purchaser cannot set up a claim to the whole of the house. [P 126 C 1]

*Manohar Lal* — for Appellant.

*Shamir Chand* — for Respondents.

**Judgment.**—The facts of the case out of which the present second appeal arises are given clearly in the judgment of the lower appellate Court and need not be repeated. The plaintiff, who is the widow of the auction-purchaser of the house in the suit, sued for a declaration that she was the owner of the whole



house and her suit has been dismissed on the ground that defendant 1 was the donee of a 1/3rd share, a previous application by her under O. 21, R. 58, Civil P. C., in regard to this 1/3rd share having been allowed. The view which the lower appellate Court took was that defendant 1 having previously established her right to a 1/3rd share in the house the right, title and interest of Bhiku, judgment-debtor, only extended to 2/3rds of the property. The purchaser at the auction-sale could not be in a better position than the judgment-debtor whose right, title and interest he purchased. In my opinion the decision of the lower appellate Court is sound,

Order 21, R. 63, Civil P. C. shows that where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but subject to the result of of such suit, if any, the order shall be conclusive. The order therefore by which defendant 1's right was acknowledged is conclusive. No doubt the auction purchaser was not a party to those objection proceedings but that fact, in my opinion, is immaterial. As pointed out in Woodroffe and Ameer Ali's Civil Procedure Code in the notes under O. 21, R. 94, no property can be sold except that which belongs to the defendant in the suit. What interest of the defendant passes is a mixed question of law and fact depending on the questions what could be sold and what was in fact sold. To ascertain this, the decree and the whole execution proceedings must be looked at. Now, it was finally decided that defendant 1 owned 1/3rd share in the house and Bhiku, judgment-debtor, owned 2/3rds. Therefore the Court had no power to sell more than a 2/3rds share. The appeal therefore fails and is dismissed with costs.

R.M./R.K. *Appeal dismissed.*

### A. I. R. 1919 Lahore 126

CHEVIS, J.

*Neki Ram*—Plaintiff—Petitioner.

v.

*Khushi Ram*—Defendant — Opposite Party.

Civil Revn. Petn. No. 561 of 1918, Decided on 17th February 1919, against decree of Senior Sub-Judge, Rohtak, D/- 19th April 1918.

(a) Evidence Act (1872), S. 102—Suit on unregistered bond—Consideration denied—Burden of proof is on plaintiff.

In a suit upon an unregistered bond if the defendant denies consideration, the onus lies on the plaintiff to prove that the bond was executed for consideration. [P 126 C 2]

(b) Evidence Act (1872), S. 102, Illus. (b)—Suit on bond — Plea of fraud—Burden of proof is on defendant.

In a case in which there is no dispute as to consideration, but the defendant raises the plea of fraud according to Illus. (b), S. 102, the onus lies on him to prove the facts which amount to fraud. [P 126 C 2]

*Gokal Chand Narang*—for Petitioner.

*Shamair Chand*—for Opposite Party.

**Judgment.**—Plaintiff sues for two instalments and interest due on a bond for Rs. 800. The defendant admits execution of the bond but denies consideration, and says plaintiff promised to give him the money but did not do so. The onus of proving that the bond was executed for consideration was placed on the plaintiff. The first Court gave him a decree, the learned Subordinate Judge on appeal dismissed the suit. Plaintiff applies for revision, and it is urged that defendant's plea is one of fraud, and so the onus lies on him and Illus. (b) S. 102, Evidence Act, is referred to. But this, I understand refers to a cause in which there is no dispute as to consideration. If there is no consideration, then apart from fraud there is no valid contract; if there is consideration there is a contract though it may be voidable for fraud. There may be cases in which the plaintiff may fail on both grounds, viz., (1) want of consideration and (2) fraud. The general rule in India is that laid down in *Wazir Singh v. Jai Gopal* (1), viz., that when a man sues on an unregistered document such as a bond if the defendant denies consideration the onus lies on the plaintiff. I consider the onus was rightly placed on the plaintiff in this case.

This is a revision so I need not go into facts. I will only remark that the attempt to prove by oral evidence that Rs. 900 or Rs. 926 was paid to the defendant in a lump sum in cash is a stupid lie, if there really was consideration it must have taken the form of settlement of old bahi account. Mr. Gokal Chand urges that the Subordinate Judge should have found whether there was any consideration at all, and should not have confined himself to the question whether there was such cash consideration as

(1) [1888] 17 P. R. 1888.



some of plaintiff's witnesses swore to. I can only say that a man who produces false witnesses does not deserve the help of this Court on the revision side. The application fails and is dismissed, but I pass no order as to costs. If defendant is telling the truth, he was a fool to execute and deliver the bond without getting the consideration.

R.M./R.K. *Application dismissed.*

### A. I. R. 1919 Lahore 127

RATTIGAN, C. J., AND LEROSSIGNOL, J.  
*Gul Muhammad*—Defendant—Appellant.

v.

*Sabz Ali Khan and others*—Plaintiff—Defendants—Respondents.

First Appeal No. 144 of 1915, Decided on 25th April 1918, from the decree of Dist. Judge, Dera Ghazi Khan, D/. 21st December 1914.

(a) Pre-emption — Suit for — Transaction purporting to be exchange alleged to be sale — Real intention should be ascertained.

Where in a suit for pre-emption it is alleged that a transaction which purports on the face of it to be an exchange is in reality a sale, it is the duty of the Court to determine what the real intention of the parties was as opposed to their apparent intention. [P 127 O 2]

(b) Pre-emption—Suit for—Plaintiff must definitely establish his connection with vendor.

The right of pre-emption is a very peculiar right which trenches upon the common freedom of contract and the plaintiff in a suit for pre-emption must therefore definitely establish his connexion with the vendor on the basis of which he claims to pre-empt. [P 128 O 2]

*Muhammad Shafi and Abdur Rashid*—for Appellant.

*Sheo Narain and Manohar Lal*—for Respondents.

**Judgment.**—On 19th January 1912 Khair Muhommad and Haidran Khan exchanged 1,926 kanals, situated at Mauza Rakh Rakh, with Gul Muhammad, who gave in exchange about 2,791 kanals of other land. On 13th January 1913, the present suit to pre-empt was instituted by the plaintiff Sabz Ali, who alleged that the exchange set forth above was really a sale in disguise and he based his claim to pre-empt on that sale on the ground that he was an heir of the vendors. The only two questions arising in the case are whether the transaction was in reality a sale and whether the plaintiff has proved that his relationship with the vendors is such that he is entitled to pre-empt. On 21st January 1912, i. e., just two days

after the challenged exchange Khair Muhammad and Haidran Khan sold for Rs. 13,100 the land taken by them in exchange, and this circumstance clearly establishes that they had no desire to acquire for themselves the land which they purported to have taken in exchange and that the cloak of an exchange was employed in order to effect the transfer of their land to Gul Muhammad without exposing him to the risk of an attack by a pre-emptor. On behalf of the appellant Mr. Shafi has contended that the transaction on the face of it was clearly an exchange and that the Court should not go behind the document. But this doctrine we are quite unable to accept, and we have no doubt that it is the business of the Court in every such case to determine what the real intention of the parties was as opposed to their apparent intention, and in this case we have no hesitation whatever in finding that what the parties intended in effect was a sale and not an exchange.

The only remaining question is whether Sabz Ali has established any definite relationship with the vendors and after careful consideration of the evidence and the arguments of the learned counsel on either side we have come to the conclusion that he has failed in his task. He has propounded a pedigree-table, of which a copy is appended to this judgment, according to which he and the vendors meet in 8th generation in the alleged common ancestor Mirza Khan; and we shall now consider the evidence by which the plaintiff seeks to establish this pedigree table. The plaintiff himself has no land in Dera Ghazi Khan where the property in litigation lies. He himself cannot recite his own pedigree table and he states that the pedigree table which he has propounded was prepared by him at his father's dictation; his father dictated to him from memory, yet his father has not been called to give evidence. Sardar Darehn Khan, who we are satisfied is behind the plaintiff in this case and has financed the litigation, is equally unable to give the plaintiff's pedigree table. Not only is he unable to give the plaintiff's pedigree table but he is ignorant of his own, and if a man of his position does not know his own pedigree table, it is surprising that a person of a comparatively low status like the plaintiff should be able to obtain any definite evi-



dence as to his own ancestry. Mr. Manohar Lal on behalf of the respondents contends that it is proved that Mirza Khan was the common ancestor of the plaintiff and the vendors, and he relies on P. Ws. 2, 3, 4, 5, 15 and 16 and also upon the defendant's own witnesses, Mohan Khan, Sardar Mehrab Khan and Sardar Gauhar Khan.

P. W. 2, Khair Muhammad Khan, is one of the vendors, but beyond saying that that Sabz Ali, the plaintiff, is his collateral he gives little aid, for he is unable to give the names of the plaintiffs' ancestors, or to state how many generations the plaintiff is removed from him. Mehran Khan, P. W. 3, makes a similar statement and Jia Khan, P. W. 4, does not advance us any further. The same may be said of Dad Muhammad, P. W. 5. P. Ws. 15 and 16 give evidence in greater detail, but it is significant that they appeared before the Court and gave evidence four weeks later than the earlier witnesses, and in that interval they had had ample opportunity for improving their memories. However that may be, Muhammad Bakhsh's evidence does not quite tally with the pedigree table propounded by the plaintiff, and it is surprising that though he can remember his own pedigree table for only four generations back, he is able to remember the plaintiff's pedigree table for eight generations back. Pir Baksh, witness 16, appears to be a man of no substance and he admits that he stayed with Sardar Darehn Khan for two nights before he gave his evidence. His evidence consists of a string of names, but even his account does not exactly tally with the pedigree table propounded by the plaintiff.

Turning now to the evidence for the defendants, Moman Khan states that Mazar Khan is the ancestor of Sabz Ali in the fifth or sixth degree of relationship, but it is obvious that his knowledge of details is unreliable, for Sabz Ali in his pedigree table mentions no Mazar Khan, though he does show a Mirza Khan in the eighth degree. This witness has clearly no accurate knowledge of the ancestry of the plaintiff and the vendors. Sardar Mehrab Khan, Sardar Bahadur, Tummandar of Bugti, and also Khan Bahadur Sardar Gauhar Khan, likewise Tummandar, both stated that there was some relationship between the vendors and the plaintiff, but their relation-

ship was a very remote one and they are unable to give any details. The alleged relationship is supported by no documentary evidence at all, and we have to consider whether the very remote and shadowy connexion that has been established between the vendors and the plaintiff is sufficient for holding that plaintiff is entitled to a decree to pre-empt. Were the plaintiff in this suit attempting to prove his right to succeed to the vendors's property as their heir, we doubt whether the evidence produced by him would be deemed sufficient to secure his success. It is probable that there is some remote connexion between the plaintiff and the vendors, but the links of that connection have not been definitely established and if such indefinite evidence were accepted as proof of relationship then it would be impossible to draw the line, for if all men are descended from Adam then all men are heirs to all their fellows. As stated above we do not think that such a shadowy connexion would suffice to secure a decree for the plaintiff in a case of succession and a fortiori in a suit to pre-empt, i. e., to enforce a very peculiar right which trenches upon the common freedom of contract, we hold that such evidence is inadequate. For these reasons we find that the plaintiff has not established any definite relationship with the vendors such as would entitle him to a decree to pre-empt on their sale and we accept the appeal and dismiss the suit, but though the plaintiff has conducted his case in a disingenuous manner and has been acting as the tool of Sardar Darehn Khan, we direct that the parties should bear their own costs throughout, because we are thoroughly satisfied that what purported to be an exchange of land between the vendors and Gul Muhammad was in reality a sale, and that their contrivance fomented and promoted litigation.

R.M./R.K.

*Appeal accepted.*

**A. I. R. 1919 Lahore 128**

WILBERFORCE, J.

*Mansa Ram and another—Convicts—Petitioners.*

v.

*Emperor—Opposite Party.*

Criminal Revn. Petn. No. 1142 of 1918, Decided on 26th November 1918, from order of Dist. Magistrate, Ambala, D/- 10th April 1918.



Penal Code (1860), S. 323—Finding that there was mere altercation and squabble between parties—Accused should be acquitted.

On an appeal from a conviction under S. 323, the District Magistrate found that there was probably an altercation and squabble between the parties and that only a technical offence had been committed:

*Held*: that on this finding the accused should have been acquitted. [P 129 C 1]

*Nand Lal*—for Petitioners.

**Judgment.**—The applicants in this case were convicted of an offence of causing hurt under S. 323 and sentenced to imprisonment for one week and a fine of Rs. 40 each. The District Magistrate on appeal held that there was probably an altercation and squabble between the parties and that only a technical offence had been committed and reduced the sentences to a fine of Rs. 5 each. The conviction under S. 323 was maintained.

Counsel for the applicants rightly urges that on the finding of the District Magistrate he should have proceeded to acquit, as he held that no offence under S. 323 had been committed. Agreeing with this contention I accept the application for revision and acquit the applicants. Fines, if realized will be refunded.

R.M./R.K.

*Petition allowed*

## A. I. R. 1919 Lahore 129

RATTIGAN, C. J.

*Rangi Ram*—Defendant—Appellant.

v.

*Gangu and others*—Plaintiffs—Respondents.

Second appeal No. 1970 of 1917, Decided on 14th May 1918, from decree of Dist. Judge, Hoshiarpur, D/- 2nd May 1917.

Civil P. C., (1908), Ss. 46 and 73—C, attaching house of judgment-debtor in execution of decree—R another decree-holder applying for rateable distribution—C. subsequently certifying that his decree is satisfied out of Court—R directed to take further proceedings in execution—Property sold in meanwhile by judgment-debtor—Alienation by judgment-debtor is not void.

C., a decree-holder, attached a house belonging to his judgment-debtor in execution of his decree. R., another decree-holder, applied for rateable distribution of the asset. Subsequently C. certified that his decree had been satisfied out of Court, and R. was directed to take further proceedings in execution in the Court which had passed the decree in his favour. Meanwhile the judgment-debtor had sold the house to the plaintiffs:

*Held*: that C's decree having been satisfied by payment out of Court the attachment effected, by him did not fructify and that R., therefore

could not contend that the alienation made by the judgment-debtor in favour of the plaintiffs was void as against him. [P 190 C 1]

*Gokal Chand Narang*—for Appellants.

*Nanak Chand*—for Respondents.

**Judgment.**—On 4th November 1912 *Rulia Ram* obtained a decree for Rs. 242-8-0 against *Bani*, and on the latter's death he took out execution of his decree on 24th August 1913 against *Mt. Indo*, judgment-debtor's widow. On the re-marriage of *Mt. Indo*, *Haku* was made legal representative of the deceased *Bani* and execution proceeded against him. The house now in suit had been attached by another creditor (*Rai Chand*) of the deceased *Bani*, and had been sold in execution of decree on 20th August 1913. This sale was subsequently set aside on 15th October 1913, but the house was re-attached by *Rai Chand* on 15th November 1913. On 4th May 1914, *Rai Chand* certified the Court that his decree had been satisfied and on the same date the Court passed an order setting aside the attachment of the house. While the attachment was still subsisting *Rulia Ram* had applied under S. 73, Civil P. C., for rateable distribution of assets and on the adjustment of *Rai Chand's* decree, *Rulia Ram* was directed to take further proceedings in execution in the Court which passed the decree in his favour. On 26th April 1914 and 3rd May 1914 by two separate deeds *Haku* sold the house to the present plaintiffs. He died shortly afterwards and *Rulia Ram* applied for several persons to be brought on the record of the execution proceeding as his representatives. Two of these persons appeared and stated that they were not the representatives of the deceased, and *Rulia Ram* thereupon elected to proceed without bringing any representatives of the deceased on the record.

The questions that arise in this second appeal before me are:

"(1) Whether the sale by *Haku* to plaintiffs, which was made at a time when the house was under attachment at the instance of *Rai Chand*, is void under S. 64, Civil P. C., against *Rulia Ram* and his representatives, inasmuch as *Rulia Ram* had prior to the sale, applied for rateable distribution of assets under S. 73, Civil P. C., and (2) Whether S. 47, Civil P. C., is a bar to the present suit."

As regards the first question the ruling of the Full Bench of the Madras High Court reported as *Annamalai Chettiar v. Palamalai Pillai* (1) is in my opinion

(1) [1917] 41 Mad. 265=43 I. O. 539 (F.B.)



a conclusive authority against the appellant's contention. The attachment was effected by Rai Chand but it did not fructify inasmuch as Rai Chand's decree was satisfied by payment out of Court and the attached property was consequently not brought to sale in execution of decree. Under these circumstances Rulia Ram cannot contend that the alienation made in favour of the plaintiffs is void as against him. The second question has been fully considered by the Courts below that it is only necessary for me to say that I entirely agree with their conclusion. The plaintiffs were not made representatives of the judgment-debtor in the execution proceedings, and I fail to see how they can be held barred from preferring the present suit by the provisions of S. 47, Civil P. C., Mr. Gokal Chand Narang asked me finally to consider the finding of the lower Courts with regard to the questions whether consideration had been proved or not, but it is not for this Court on second appeal to deal with questions of fact depending for their determination on the evidence of witnesses which has been fully considered by the Courts below.

I accordingly reject this appeal with costs.

R.M./R.K. *Appeal rejected.*

### A. I. R. 1919 Lahore 130 (1)

RATTIGAN, C. J.

*Solakhan Mal*—Plaintiff—Petitioner.

v.

*Ali Bakhsh and another*—Defendants—Opposite Parties.

Civil Revn. Petn. No. 352 of 1918, Decided on 24th January 1919, against decree of Munsif, First Class, Jullundur, D/- 19th November 1917.

Civil P. C., (1908), O. 2, R. 2—Mortgaged property leased to mortgagor—Suit on mortgage dismissed as time barred—Subsequent suit for rent is not barred.

Plaintiff sued for recovery of rent. It appeared that he had obtained a mortgage from the defendant and had subsequently let out the premises to him. The Court dismissed the suit on the preliminary ground that an earlier suit by the plaintiff for recovery of the mortgage money had been dismissed as time-barred:

*Held*: that the plaintiff's right to recover rent was dependent on a contract made by him subsequently to the mortgage in his favour, and that therefore the mere dismissal of the previous suit for the mortgage money could not debar him from claiming rent. [P 130 C 2]

*Jagan Nath*—for Petitioner.

*Badrudin Kureshi* — for Opposite Parties.

**Judgment.**—The Small Cause Court has dismissed the plaintiff's suit on the preliminary ground that a previous suit by him to recover the money due on his mortgage was dismissed as time-barred. The present suit is one for rent and it appears that on the very day on which plaintiff's suit for his mortgage money was dismissed, a previous suit by him for rent from the defendant was decreed in his favour. I cannot agree that the mere dismissal of the suit for the mortgage money can affect plaintiff's right to recover rent, which is dependent on a contract made by him subsequently to the mortgage in his favour. I accordingly accept this petition and setting aside the order of the lower Court, I remand the case for determination in accordance with law.

R.M./R.K. *Petition accepted.*

### A. I. R. 1919 Lahore 130 (2)

SHAH DIN, J.

*Daulat Ram*—Defendant—Appellant.

v.

*Gadi Ram and another* — Plaintiffs — Respondents.

Second Appeal No. 2100 of 1917, Decided on 17th April 1918, from decree of Addl. Dist. Judge, Multan, D/- 24th April 1917.

(a) Civil P. C. (1908), O. 21, Rr. 97 and 99—Application under O. 21, R. 97 dismissed under R. 99—Court has no jurisdiction to desist person in whose favour order is passed to bring regular suit to establish right—Suit is not governed by Art. 2, Sch. 2, Lim. Act.

Where an application under R. 97, O. 21, Civil P. C. is dismissed under R. 99 of the order, the Court has no jurisdiction to direct the person in whose favour the order is passed to bring a regular suit to establish his rights, and a suit brought by such a person is not governed by Art. 11, Sch. 1, Lim Act. [P 131 C 1]

(b) Civil P. C. (1908), S. 100—Finding that house is dharmasala, dedicated to public use is one of fact.

The finding of lower appellate Court that a house is a dharmasala and has been dedicated to public, religious or charitable uses is one of fact and cannot be disturbed in second appeal. [P 131 C 1]

*Durga Das*—for Appellant.

*Rajindar Parshad*—for Respondents.

**Judgment.**—The facts of this case are very fully given in the judgment of the District Judge and it is unnecessary to repeat them here. The first point



urged by the defendant appellant's pleader is that the suit of the plaintiffs respondents is barred by limitation under Art. 11, Seb. 1, Lim. Act. In this connexion it is argued that the order of the Munsif, dated 30th March 1915, on the application of the appellant, dated 27th January 1915, directed the Hindu Panchayat of Karor, which was represented by the persons who were offering resistance to the appellant in obtaining possession of the house in dispute, to bring a regular suit to establish their rights; and that since the present suit was not brought under R. 103, O. 21, Civil P. C., within the period of one year laid down by Art. 11, Lim. Act, the suit is barred by time.

This argument is based upon a misconception of the order of the Munsif, dated 30th March 1915. By that order the application of the appellant, dated 27th January 1915, was dismissed, and the order was clearly passed under R. 99, O. 21. Such being the case, the Munsif had no jurisdiction to direct the persons in whose favour the order in question was passed, or the Hindu Panchayat of Karor, to bring a regular suit to establish their rights; and R. 103 of the said order has no application whatever to the case. It is therefore clear that the present suit is not barred by Art. 11, Lim. Act.

The question of *res judicata* raised in the third ground of appeal was not argued before me and need not therefore be decided. On the merits of the case, I hold, on the authority of *Sant Das v. Ram Bai* (1), that the finding of the District Judge that the house in dispute is a *dharmsala* and has been dedicated to public, religious or charitable uses is one of fact and cannot be disturbed in second appeal. The facts of this case are very similar to those of the case cited; and even if the question involved were one of law, I entirely agree with the District Judge that, upon the material on the record, it must be held that the house in dispute has been made by user, if not by express dedication, a *dharmsala*, and cannot be treated as private property.

The only other point argued before me is one raised in the tenth ground of appeal; but this ground of appeal is identical with the fifth ground taken before the District Judge, as to which that officer has noted in his judgment that it

was not touched upon at all in argument before him. I cannot therefore allow the appellant to raise it in this Court.

The appeal fails and is dismissed with costs.

R.M./R.K.

*Appeal dismissed.*

### A. I. R. 1919 Lahore 131

SCOTT-SMITH AND MARTINEAU, JJ.

*Bhan Singh and others* — Plaintiffs—Appellants.

v.

*Jagat Singh and others* — Defendants—Respondents.

Misc. Second Appeal No. 808 of 1918, Decided on 5th August 1918, from order of Addl. Dist. Judge, Amritsar, D/- 15th December 1917.

Punjab Land Revenue Act (17 of 1877), S. 158—Partition of holdings held for fixed term—Revenue Court has exclusive jurisdiction.

Under S. 158 (2) (17), a civil Court has no jurisdiction to entertain a suit for partition of agricultural land brought by a tenant holding for a fixed term. Such a claim must be made in a Revenue Court. [P 131 C 2]

*Gokal Chand Narang*—for Appellants.

*Lal Chand Khosla*—for Respondents.

**Judgment.**—Sawan Singh, one of the joint owners of certain land, leased his share to the plaintiffs for six years. The plaintiffs got a decree for joint possession and obtained formal possession in execution. In the present suit they ask for a decree for actual possession by partition. The lower Courts have concurred in holding, that the civil Court has no jurisdiction, and the question is, whether that decision is correct. The contention on behalf of the plaintiffs appellants is that they are neither owners of the land nor occupancy tenants and therefore cannot apply to the Revenue Officer for partition under S. 111, Land Revenue Act, that their only remedy is to sue in the civil Court, and that the claims for partition referred to in S. 158 (2)(17), Land Revenue Act, in regard to which the jurisdiction of the civil Court is ousted, mean only such claims as a Revenue Officer can dispose of. We agree that plaintiffs are not owners of the land since they are tenants under Sawan Singh, and the term "landowner" as defined in S. 3 (2), Land Revenue Act does not include a tenant.

But as regards the second point, there is nothing in Cl. (17), S. 158 (2) to show that that clause includes only those claims for partition which a Revenue

(1) [1918] 88 P. R. 1918=20 I. O. 295.



Officer is empowered to deal with under Ch. 9. The words used are "any claim for partition of an estate, holding or tenancy" without any qualification. The appellants' contention appears at first sight to be supported by the words "and in particular," which occur just before sub-S. (2). Sub-S. (1) provides that a civil Court shall not have jurisdiction in any matter which the Local Government or a Revenue Officer is empowered by this Act to dispose of, or take cognizance of the manner in which the Local Government or any Revenue Officer exercises any powers vested in it or him by or under this Act. Then come the words "and in particular" followed by sub S. (2), "a civil Court shall not exercise jurisdiction over any of the following matters, namely, etc."

If the words "and in particular" implied that the specific matters enumerated in the various clauses of sub-S. (2) are all included in the general class mentioned in Sub-S. (1), the appellants' contention would be correct. But we think that this was not the meaning. Had the intention been to subordinate the words "a civil Court shall not exercise jurisdiction over any of the following matters" and the 23 clauses which follow to sub-S. (1), it would have been natural to include them in that sub-section. The fact that they were not so included, but form a separate sub-section, would show that they are to be treated as independent of, and not as subordinate to sub-S. (1). Although cases coming under most, if not all, of the clauses of sub-S. (2) would ordinarily also fall within the general category described in sub-S. (1), it is not necessary that they should do so.

With regard to partition cases in particular, we think it would be very improbable that it could have been intended that, whilst a claim for partition of agricultural land when made by a landowner or an occupancy tenant should be dealt with only by a Revenue Officer, the civil Court should have jurisdiction to dispose of such a claim when made by a tenant holding for a fixed term. The reason for the omission to provide in S. 111 that an application for partition might be made to a Revenue Officer by a tenant holding for a fixed term was probably, not that it was thought proper to reserve to the civil Court juris-

diction in respect of a claim made by such a tenant, but that it was considered that such a tenant should not be entitled to apply for partition at all. We therefore hold that the Courts below are right in deciding that the civil Court has no jurisdiction in the present case and we dismiss the appeal with costs.

R.M./R.K.

*Appeal dismissed.***A. I. R. 1919 Lahore 132**

MARTINEAU, J.

*Bala Parshad-Sarni Mal*—Defendant  
—Appellant.

v.

*Jawala Dat-Ram Kanwar*—Plaintiff  
—Respondent.

Second Appeal No. 1067 of 1918, Decided on 2nd January 1919, from the decree of Dist. Judge, Delhi, D/- 2nd December 1917.

**Contract Act (1872), S. 23—Vendee cannot claim commission—Such contract is against S. 23.**

A person making a purchase of goods on his own behalf is not entitled to claim commission, such claim being unlawful, immoral and opposed to public policy. [P 132 C 2]

*Rup Ram*—for Appellant.*Mahesh Das*—for Respondent.

**Judgment.**—The plaintiff has been given a decree for money due for the price of goods sold by him to the defendant, and the only question in this appeal is, whether the latter is entitled to deduct commission. The lower appellate Court has held, following *Madho Ram v. Badr-ud-din* (1), that he is not. The ruling followed by the learned District Judge appears to be in point. What the defendant is claiming is not brokerage, but it is immaterial what name is given to it. He bought the goods, so far as the record shows, on his own account, and as has been held in the case cited above, a claim by him for commission on such purchases is unlawful as being immoral and opposed to public policy. Even if the plaintiff used to pay commission before, the defendant cannot legally claim that it should be deducted from the price. I dismiss the appeal with costs.

R.M./R.K.

*Appeal dismissed.*

(1) [1910] 91 P. R. 1910=8 I. C. 317.



## A. I R. 1919 Lahore 133

MARTINEAU, J.

*Chanan Mal and others* — Defendants  
—Appellants.

v.

*Mela Ram and another* — Plaintiffs  
and Defendants—Respondents.

Second Appeal No. 2673 of 1918, Decided on 10th February 1919, from decree of Senior Sub-Judge, Jullundur, D/- 9th May 1918.

Limitation Act (1908), Art. 142—Suit for possession by mortgagee against strangers—Art. 142 applies and not Limitation Act (1908), Art. 135.

Article 135, Sch. 1, Lim. Act, applies only to a suit by a mortgagee against the mortgagor or a person deriving title from the mortgagor.

[P 133 C 2]

*J. and P.*, two brothers owned a house. *P.* mortgaged his half share without possession to the plaintiff in 1893. In 1897 he executed another deed reciting that possession was given to the mortgagee on account of default in payment of interest on the first mortgage. In 1915 defendant had the whole house sold in execution of a decree obtained against *J.* and his sons and purchased it himself. He and his sons having taken possession of the whole house plaintiff brought the present suit for possession of the half share mortgaged by *P.*

*Held*:—(1) that the suit was governed by Art. 142, Sch. 1, Lim. Act and not by Art. 135 and was within time; [P 133 C 2]

(2) that the possession of the plaintiff was to be presumed from the fact that he was a co-sharer in the house with *J.*, who was in possession. [P 134 C 1]

*Govind Das*—for Appellants.

*Jagan Nath*—for Respondents.

**Judgment.**—The house in dispute belonged to two brothers, Pohlu and Jhandu. The plaintiff Mela Ram is a mortgagee of Pohlu's half share under a deed executed by Pohlu in 1893 and an additional deed executed in 1897. The first mortgage was without possession but the second deed recited that possession had been given to the mortgagees (Mela Ram and one Dhirta Ram) on account of default in payment of interest on the first mortgage. In 1915 Chanan Mal, defendant 1. had the whole house sold in execution of a decree obtained against Jhandu and his son and purchased it himself. He and his sons afterwards took possession of the whole house and in consequence Mela Ram and his brother brought the present suit for possession of the half share that was mortgaged by Pohlu. The first Court dismissed the suit as barred by limitation under Art. 135, Sch. 1, to Lim. Act, but on appeal the learned Senior Subordinate Judge has

held that as the suit is not brought against the mortgagor or his representative Art. 135 does not apply and he has given the plaintiffs a decree.

The defendants have filed a second appeal in this Court and it is contended on their behalf that the lower appellate Court is wrong in holding that Art. 135 applies only to a suit against the mortgagor. My attention has been drawn to p. 425 of Rustomji's Law of Limitation Edn. 2, where the learned author notes that whilst Art. 146 expressly refers to a suit for recovery of possession from the mortgagor Art. 135 seems to be applicable to a suit against the mortgagor or any body else. It is true that it is not expressly stated in Art. 135 that the suit referred to therein is one against the mortgagor but the view that that article was meant to apply generally to any suit by the mortgagee for possession of the mortgaged property would lead to manifest absurdities. For instance in the present case even if the plaintiffs were in possession of the mortgaged property from the date of the mortgage up to the time when Chanan Mal took possession after his purchase their suit would, if the contention put forward by counsel for the appellants were correct, be barred under Art. 135 because 12 years had elapsed since the mortgagor's right to possession determined. In fact, if we were to accept the theory advanced by counsel for the appellants it would not have been necessary for Chanan Mal to purchase the property or have even a shadow of a title to it but he or any one else could have taken forcible possession and have successfully resisted the plaintiffs' claim by pleading that the time prescribed in Art. 135 for a suit by the mortgagee had expired. Obviously such a state of things could never have been intended and I have no hesitation in holding in agreement with the lower appellate Court that Art. 135 applies only to a suit by the mortgagee against the mortgagor or a person deriving title from the mortgagor and therefore does not apply to the present case which is governed by Art. 142.

The only other question is whether the plaintiffs have been in possession within 12 years of the suit. The lower appellate Court has referred to certain documents as showing that the plaintiffs' possession was admitted. It is



argued for the appellants that these cannot be relied upon as acknowledgments giving fresh starting points for limitation under S. 19, Lim. Act, because they were not specifically mentioned in the plaint. But without going into this point, I think that the plaintiffs' possession is to be presumed from the fact that they were cosharers in the house with Jhandu, who was in possession. It is not suggested that Jhandu did any act by which he set himself up as exclusive owner of the house and consequently his possession must be regarded as the possession of the plaintiffs also. I hold that the suit is within time and the decision of the lower appellate Court is correct. The appeal is dismissed with costs.

R.M./R.K. *Appeal dismissed.*

### A. I. R. 1919 Lahore 134 (1)

CHEVIS, J.

*Shadi Ram*—Convict—Petitioner.

v.

*Emperor*—Opposite Party.

Criminal Revn. N. 7 of 1919, Decided on 31st January 1919, from order of Sess. Judge, Ludhiana, D-/ 4th October 1918.

Penal Code (45 of 1860), S. 448—Criminal trespass—Mortgagee putting lock on premises is not guilty.

Two brothers *R.* and *M.* owned a house. *R.* mortgaged it with possession to the accused, while *M.* leased it to the complainant and put him in possession. During the temporary absence of the complainant the accused, who wanted to get possession of the house as mortgagee, put a lock on the house:

*Held:* that he was not guilty of criminal trespass and that the matter was one for the civil Courts to deal with. [P 131 C 1]

*Jagan Nath*—for Petitioner.

**Judgment.**—The petitioner *Shadi Ram* has been convicted under S. 448, I. P. C., and sentenced to a fine of Rs. 50. The facts appear to be as follows: The house in question belonged to two brothers, *Ramdas* and *Mulkraj*. *Ram Das* mortgaged it with possession to *Shadi Ram* and *Mulkraj* leased it to *Pohlo Mal*, who is complainant in the present case. *Pohlo Mal* was in possession, but during his temporary absence *Shadi Ram* who wanted to get possession as mortgagee, put a lock on the house. This was an irregular act, but putting aside the question whether affixing a lock can be regarded as an entry, I do not think it is a case of criminal trespass. It seems to me a matter for the civil Courts to deal

with. I set aside the conviction and sentence and order the fine if paid to be refunded.

R.M./R.K. *Conviction set aside.*

### A. I. R. 1919 Lahore 134 (2)

CHEVIS, J.

*Rahmat Beg*—Plaintiff—Appellant.

v.

*Mt. Shah Begam and others*—Defendants—Respondents.

Misc. Second Appeal No. 1471 of 1917, Decided on 29th April 1918, from order of Addl. Dist. Judge, Lahore, D/- 20th March 1917.

Restitution of Conjugal Rights—Value of suit Rs. 200 for court-fee and Rs. 1000 for jurisdiction—Prayer for injunction need not be separately valued.

The valuation of a suit for restitution of conjugal rights in which the plaintiff asks for a decree against the other party to the alleged marriage either alone, or with other defendants, is Rs. 200 for purposes of court-fee and Rs. 1,000 for purposes of jurisdiction. In such a suit the claim for an injunction against the relatives of the wife is merely an ancillary and incidental relief and need not be separately valued.

[P 134 C 2; P 135 C 1]

*Mohsin Shah*—for Appellant.

*Niaz Ali*—Respondents.

**Judgment.**—This is a suit by a husband who claims a decree against his wife for restitution of conjugal rights, and an injunction against her father, mother and two brothers restraining them from preventing her return to him. The first Court having decreed the claim the wife appealed to the District Judge, and on her behalf it was urged that as the value of the decree for restitution alone was Rs. 1,000, the value of the whole suit including the injunction must be over Rs. 1,000, and so the case was beyond the jurisdiction of the first Court and the plaint was understamped. The learned District Judge held these pleas sound and reversed the first Court's decree and ordered the plaint to be returned for presentation to a Court of competent jurisdiction after making up stamp. The plaintiff appeals to this Court, the wife's mother is now dead, so I strike her name off the record. I think the learned District Judge is wrong. *Mt. Bhani v. Bansi* (1) is an authority for holding that the claim for an injunction is merely an ancillary and incidental relief. Further I note that in the rules made by the Chief Court with the sanction of the Local Government, we find:

(1) [1916] 33 I. O. 1002.



"suits in which the plaintiff in the plaint asks for a decree against the other party to the alleged marriage, either alone or with other defendants, for restitution of conjugal rights;"

are valued at Rs. 200 for purposes of court-fee and at Rs. 1,000 for purposes of Suits Valuation Act and Punjab Courts Act. Now nobody but the wife herself can restore the conjugal rights so as against other defendants to such a suit the claim could only be for an injunction. The learned pleader for the respondents points to S. 7, Cl. 4 (d), of the Court-fees Act, but that relates to suits in which the main relief is an injunction. I hold that the first Court had jurisdiction to try the case, and that the plaint is sufficiently stamped. I therefore accept this appeal and reversing the District Judge's decision I return the case to him for decision of the appeal on the merits. Stamp on appeal to this Court to be refunded; other costs in this Court to follow the event.

R.M./R.K. *Appeal accepted.*

### A. I. R. 1919 Lahore 135

SHADI LAL AND WILBERFORCE, JJ.

*Mt. Khadija*—Defendant—Appellant.

v.

*Mt. Fidya Tuz Zohra*—Plaintiff—Respondent.

Second Appeal No. 2889 of 1917, Decided on 22nd May 1918, from the decree of Dist. Judge, Karnal, D/- 24th August 1917.

Minor—Decree against—Decree passed after attaining majority—Suit to set aside decree is not maintainable.

An infant is entitled to impeach a decree passed against him by a separate suit, provided he establishes that his guardian has been guilty of fraud or gross negligence in allowing the decree to be passed against him.

The right to bring a separate suit to set aside a previous decision cannot however be claimed by a person who though an infant during part of the proceedings, had attained majority at the time of the judgment. [P 135 O 2]

*Nanak Chand* and *Niaz Ali*—for Appellant.

*Fazl-i-Hussain*—for Respondent.

**Judgment.**—This second appeal arises out of an action brought by the respondent *Mt. Fidya* for setting aside a decree obtained against her by the appellant *Mt. Khadija* on 28th April 1916. The allegations, on which the plaintiff seeks to avoid the consequences of that decree, are that she was treated to be a major, though she was, as a matter of fact, a minor up to 12th April 1916, on which

date she attained the age of majority; and that the decree was the result of collusion between her agent Muhammad Askari and the then plaintiff. The District Judge finds that *Mt. Fidya* attained majority on 12th April 1916; and holds that "in view of the fact that nearly all the proceedings had ended during minority of plaintiff" she is entitled to maintain the present suit. It is beyond dispute that on the date, on which the decree was passed against her, *Mt. Fidya* was not only represented to be, but was, as a matter of fact, an adult. It is clear that during the proceedings of the suit which resulted in the decree she was all along treated as a major, and indeed she appointed her first cousin Muhammad Askari to defend the suit, and also signed a power of attorney in favour of a pleader.

The crucial point for determination is whether the plaintiff is entitled to bring a separate suit to set aside the judgment and decree passed against her. The rule of law is perfectly clear that an infant is entitled to impeach a decree passed against him by a separate suit, provided that he establishes that his guardian has been guilty of fraud or gross negligence in allowing the decree to be passed against him. Now, as pointed out above, the plaintiff had attained the age of majority 16 days before the date of the decree in question, and we cannot therefore view that decree as one passed against an infant, simply because the plaintiff was a minor at the time the action was brought, and also continued to be a minor during the major portion of the period taken up by the trial of the suit. Mr. *Fazl-i-Husain* for the plaintiff is unable to cite any authority to the effect that the right to bring a separate suit to set aside a previous decision can be claimed by a person who, though an infant during part of the proceedings, was undoubtedly sui juris at the time of the judgment. Upon general principles we see no valid ground for holding that the decision in the previous suit does not operate as a bar to the present action.

A Division Bench of the Madras High Court has held that a decree obtained against a person treating him as a minor, while in reality he was a major on its date, is not a nullity: vide *'Seshagiri*



*Rao v. Tangaturi Jaganadham* (1) and it seems to us that this rule applies a fortiori to a case where the person seeking to impeach the decree was not only an adult but was also treated as such. It is beyond dispute that it was open to Mt. Fidyia either to apply to the trial Judge for a review of the judgment, or to impeach the correctness thereof by preferring an appeal to the higher Court, but she did not avail herself of either of these remedies. We consider that the plaintiff is not entitled to open the previous judgment by a new suit. We accordingly accept the appeal and setting aside the decree of the lower appellate Court dismiss the suit with costs throughout.

R.M./R.K. *Appeal accepted.*

(1) [1916] 39 Mad. 1031=32 I. C. 391.

### A. I. R. 1919 Lahore 136 (1)

LERO-SIGGNOL, J.

*Emperor*

v.

*Chet Singh* — Accused.

Criminal Revn. No. 895 of 1918, Decided on 7th August 1918, reported by Dist. Magistrate, Gurdaspur.

Penal Code (1860), S. 176— Sentence under S. 176 should commence at once— Punjab Jail Manual R. 464 (2).

A sentence passed under S. 176 should commence at once according to the rule contained in R. 464 (2) of the Punjab Jail Manual and should not be postponed till the expiry of the term of imprisonment which the accused is undergoing in default of furnishing security.

[P 136 C 2]

**Facts.**—The accused has three times been sentenced on conviction of theft and burglary. In the last conviction under S. 457, I. P. C., he was sentenced to five years' imprisonment and was ordered under S. 565, Criminal P. C. to notify his residence on release from jail for a period of two years. He returned from jail in September 1917, and after duly notifying his residence settled in his village Ladha Manda, Thana Sri Gobindpur in this district. Subsequently on the night of 23rd September 1917 he did not even inform the lambardars and chaukidars of his intended destination under R. 3 of the rules published in Punjab Government Notification No. 574, dated 3rd April 1910 made under sub-S. (3), S. 565, Criminal P. C. He says he was ill but he admitted that he could walk about. The fact is clear from the evidence of the chaukidar. Subsequently

in Amritsar he was arrested as a vagabond under S. 109, Criminal P. C. and was ordered in April last to furnish security. He has not furnished security and is now undergoing one year's rigorous imprisonment. By the facts the accused has been found guilty under Part 1 of S. 176, I. P. C. as read with Cl. (4), S. 565, Criminal P. C. The Magistrate has therefore sentenced him to undergo one month's simple imprisonment. This sentence shall commence on expiry of the sentence for which he is in jail now.

**Grounds.**—The Magistrate has sentenced the accused to undergo one month's simple imprisonment under S. 176, I. P. C., sentence to be undergone on completion of a sentence he was already undergoing in default of giving security for good behaviour under S. 109, Criminal P. C. This sentence under S. 176, I. P. C. should commence at once according to the rule contained in R. 464 (2) on p. 144, Edition 1916 of the Punjab Jail Manual. I therefore submit the record to the Chief Court for revision.

**Order.**—I set aside so much of the order of the Magistrate as directs that the sentence passed under S. 176, I. P. C. should commence on the expiry of the term of imprisonment which the accused is undergoing in default of furnishing security and order that the sentence under S. 176, I. P. C. should commence at once as laid down in R. 464 (2), Punjab Jail Manual.

R.M./R.K. *Sentence modified.*

### A. I. R. 1919 Lahore 136 (2)

RATTIGAN, C. J. AND MARTINEAU, J.

*Raja and others* — Accused — Appellants.

v.

*Emperor*—Opposite Party.

Criminal Appeal No. 592 of 1918, Decided on 11th January 1919, from order of Sess. Judge, Lyallpur, D/- 26th July 1918.

Penal Code (1860), Ss. 34, 302 and 325— Three accused attacking deceased—No evidence to show whose blow proved fatal— All held guilty of causing grievous hurt.

Accused three in number came up to where the deceased was ploughing a plot of land and tried to prevent him from doing so. The deceased resisted and thereupon the accused attacked him with sticks and a phaura, and caused his death by a blow on the head. It was not clear which of the accused had struck the fatal blow.



*Held*; that having regard to the provisions of S. 34, all the accused were guilty of causing grievous hurt. [P 137 C 2]

*Mukand Lal Puri*—for Appellants.

*Herbert*—for the Crown.

**Judgment.**—On the morning of 30th June 1918, one Mapala in the course of a fight received an injury to the head which proved fatal, the injured man dying in the hospital on the following evening. In connexion with his death Raja, appellant, has been found guilty of murder and sentenced to transportation for life and Malla and Murad have been convicted of causing grievous hurts under S. 325, I. P. C., and sentenced each to rigorous imprisonment for three years. They have appealed through counsel to this Court and to a large extent the facts are not in dispute.

It appears that the appellants have a share in the land of Hashmatwala well and that their cosharers Mahni Ram and Nigahi Ram, some years ago leased their land attached to this well to the deceased Mapala and his nephew Karam for a period of five years. On the expiry of the lease Mapala apparently retained forcible possession of the land despite the efforts of the appellants to recover it from him. Appellants contend that the land was subsequently leased to them by Mahni Ram and Nigahi Ram, but this contention is not borne out by the evidence of Mahni Ram. According to the prosecution, Mapala was ploughing the land on the morning in question when the appellants came up and endeavoured to prevent him from doing so. Raja is said to have had a phaura in his hand and Malla and Murad had sticks. A quarrel ensued and in the course of it Raja is said to have struck the deceased on the head with the phaura while others hit him with their sticks. The defence story is to the effect that Mahni Ram had leased the land to the appellants and that Malla was in the act of ploughing it, when Mapala, Karam, Mathana, Rihana and Shera came up armed with sticks, assaulted him and struck him down, that Raja came up subsequently and was seized by Mapala who threw him to the ground while Rihana, Pathana, Karam and Shera beat him with their sticks and in so doing must have injured their uncle Mapala, who was on the ground holding Raja down.

As pointed out by the learned Sessions

Judge, it is impossible to believe either the prosecution story or that for the defence in its entirety and there is no doubt a great deal of falsehood on both sides. The probabilities however seem to be largely in favour of the prosecution version and we are satisfied that it was Raja, Malla and Murad who were the aggressors in the first instance. They came up with the intention of stopping Mapala by force from ploughing the land to which they considered he had no right and they were determined to prevent his ploughing it at all hazards and if necessary, to cause grievous hurt to Mapala and his party. We do not think that we can accept the evidence of the prosecution witnesses who depose that it was Raja who inflicted the fatal blow for had it been known who had given that blow we have no doubt that the fact would have been mentioned in the first report which was made very shortly after the occurrence by Karam. One or other of the appellants was however guilty of striking Mapala on the head and in doing so he was but carrying out the common intention of all three appellants. As pointed out by the learned Sessions Judge, a phaura is not such a weapon as would inevitably cause death and the fact that Karam was also hit on the head with the same phaura and yet suffered no great injury is sufficient proof that a blow from it even on the head would not necessarily cause death. In our opinion the offence of which the appellants were guilty was that punishable under S. 325 read with S. 34, I.P.C. and we alter the conviction accordingly. Raja seems to have taken the leading part in the fight and though it is not certain that he caused the death of Mapala, we consider that his punishment should be more severe than that awarded to Murad and Malla. The latter have been sentenced to three years' rigorous imprisonment each and we direct that Raja suffer rigorous imprisonment for a period of five years. We accept the appeal to this extent and alter the convictions as above indicated.

R.M./R.K. *Appeal partly accepted.*



## A. I. R. 1919 Lahore 138

MARTINEAU, J.

*Jamna Dass and others*—Plaintiffs—Petitioners.

v.

*Nanda and others*—Defendants—Opposite Parties.

Civil Revn. Petn. No. 918 of 1918, Decided on 10th February 1919, against decree of Senior Sub-Judge, Karnal, D/-6th June 1918.

**Oaths Act (1873), S. 11—Defendant offering to be bound by plaintiff's oath—Plaintiff taking oath—Court cannot go into legality of agreement.**

Plaintiffs sued to recover Rs. 500 on account of the price of 5 buffaloes, alleging that a criminal case brought against defendant 3 for theft of the buffaloes was compromised in a panchayat where the defendants promised to return the buffaloes or pay Rs. 500 to the plaintiffs. In the course of the trial defendant 5 stated that if the plaintiffs would take a certain oath in a prescribed form and swear that he, defendant 5, had been present at the panchayat and had stood surety for the return of the buffaloes, he would pay Rs. 500. The plaintiffs took the oath.

*Held:* that the defendant had confessed judgment subject to a certain condition and that on the fulfilment of the condition there was no issue of law or fact to go into and the plaintiffs were therefore entitled to a decree as they had taken the oath in the prescribed form.

[P 138 C 2]

*Nand Lal*—for Petitioner.

*N. C. Mehra*—for Opposite Parties.

**Judgment.**—The plaintiffs' allegations in brief are that some buffaloes of theirs were stolen by defendants 1 and 2 at the instigation of defendant 3 while a criminal case brought by one Mangal against defendant 3 and other persons was pending, and that a panchayat was convened with the result that defendants 1 and 2 promised to return the buffaloes or pay Rs. 500 to the plaintiffs in consideration of Mangal compromising the criminal case, and defendants 3 to 7 stood sureties for the performance of the agreement. Mangal compromised the case he had brought, but the defendants did not return the buffaloes to the plaintiffs or pay the money, so the plaintiffs brought the present suit for Rs. 500. While the suit was pending, Nanda defendant 5 stated before the Munsif that if the plaintiff Jamna Das would swear on Ganges water that he (Nanda) had been present at the panchayat and had stood surety for the return of the buffaloes, he would pay Rs. 500. Jamna Das took the oath, and the Munsif

accordingly passed a decree for Rs. 500 against him. On Nanda's appeal, as it appeared that the oath had not been administered to Jamna Das at the place named by Nanda, namely, at the Khera Samadh, the lower appellate Court issued a commission for the oath to be administered to Jamna Das at that place. Jamna Das then took the required oath at the Khera Samadh. It is contended before me on behalf of Nanda that the oath was not taken in the form in which Nanda had asked that it should be taken, but I find that this contention is not correct and that the oath was duly taken in the manner required by Nanda.

The learned Senior Subordinate Judge has, notwithstanding that Jamna Das took the oath that was required of him, dismissed the suit on the grounds (1) that the agreement entered into by the defendants was illegal, and (2) that as the plaintiffs had not pressed for a decree against the principal debtors namely, defendants 1 and 2, Nanda's remedy against those defendants was impaired and he was discharged from the liability under S. 139, Contract Act. The plaintiffs have applied to this Court for revision. It is contended in the first place on their behalf that the decree of the Munsif was a consent decree, from which no appeal lay, and that therefore the Senior Subordinate Judge's decree was passed without jurisdiction. I do not agree with this contention. Nanda consented to pay the money only on condition that Jamna Das took an oath in a certain form and at a certain place. The oath was administered the first time at a place different from the one prescribed. The condition not having been fulfilled it cannot be said that the decree passed by the Munsif was a consent decree.

But the second contention, namely, that after the oath had been taken the second time, when the required conditions were fulfilled, the lower appellate Court was not competent to go into the questions of the legality of the agreement and the liability of Nanda thereunder, appears to be sound. It is true that S. 11, Oaths Act, only provides that the evidence taken on oath shall be conclusive proof, as against the person who offered to be bound by the oath, of the matter stated, and that the Act does not lay down that a decree shall be passed thereon, and if Nanda had merely agreed



that the question whether he had guaranteed the return of the buffaloes to the plaintiffs should be decided on Jamna Das' oath, the lower appellate Court would have been right in going into the further questions as to the legality of the agreement and Nanda's liability. But Nanda went further than this. He not only agreed to abide by Jamna Das' oath on the question whether he had stood surety; but he said that if Jamna Das took the oath he would pay Rs. 500. In other words, he confessed judgment subject to a certain condition being fulfilled. On the fulfilment of the condition there was no issue of law or fact for the lower appellate Court to go into, and the plaintiffs were entitled to a decree on Nanda's statement. I accordingly accept this application, reverse the decree of the lower appellate Court, and restore the decree of the first Court. The defendant Nanda will pay plaintiffs' costs throughout.

R.M./R.K. *Application accepted.*

### A. I. R. 1919 Lahore 139

WILBERFORCE, J.

*Mirza Ali—Debtor—Appellant.*

v.

*Mt. Qadari Khanam—Creditor—Respondent.*

Misc. First Appeal No. 2377 of 1917, Decided on 3rd February 1919, from order of Dist. Judge, Karnal, D/- 16th July 1917.

Provincial Insolvency Act (1907), Ss. 24, 26 (2), 43 and 45 (2) — Discharge conditional on furnishing security for deferred dower is invalid—Insolvent should be granted unconditional discharge.

In the schedule of his debts an insolvent included the amount due to his wife for prompt dower for which a decree had been passed against him. His wife however got the full amount of the dower entered in the schedule. He paid off all debts and then applied for a discharge. The Court granted the application conditional on the insolvent furnishing security for the payment of the deferred portion of the dower when it became payable and directed that unless he complied with this order, proceedings under S. 43, should be continued against him.

*Held:* (1) that in view of the proviso to S. 24, the amount of deferred dower should not have been entered in the schedule; [P 140 C 2]

(2) that it was not fair to suspend the discharge of the insolvent on account of an undetermined liability which might never arise, and that the Court was not competent to make it a condition of the discharge that the insolvent should furnish security for the amount of this liability. [P 189 C 1]

(3) that the wife of the insolvent should apply for expunging the debt from the schedule and that the insolvent should be granted an unconditional discharge. [P 140 C]

*Nand Lal*—for Appellant.

*Naiz Ali*—for Respondent.

**Judgment**—In this case an insolvency petition was presented by one Mirza Ali in 1900. Among his debts he included Rs. 662 as due to his wife for prompt dower for which a decree had been passed. He has now paid off all his debts and has applied for an order of discharge. This has been granted conditionally on his furnishing security to the Court for the payment of the deferred portion of the dower when it becomes payable. It was directed moreover that unless he complied with this order, proceedings under S. 43 would be continued against him. Against this decision both the insolvent and his wife appeal. The wife asks that the entire amount be paid before discharge is allowed and that the proceedings under S. 43 may be continued. The latter ground of appeal has however been withdrawn. The insolvent appeals against the order requiring him to give security for a debt not yet due and which may never become due. The insolvent himself merely entered in the list of debts the amount due on account of prompt dower. His wife however got the full amount of both prompt and deferred dower entered in the schedule, and it is argued on her behalf that an unconditional order of discharge will release the insolvent from any amount due as deferred dower under S. 45 (2), Provincial Insolvency Act. This of course is correct, but the remedy against any such injustice is simple. The Court should have directed the wife to make an application herself or through the receiver under S. 26 (2) of the Act for the expunging of the amount of the deferred dower. It is moreover most doubtful whether the debt should have been originally included in view of the proviso to S. 24.

The value of the deferred dower as the time when the amount was entered in the schedule was incapable of being fairly estimated, as it was possible for it to become payable after a short or long period or perhaps, never to become payable in the event of the wife predeceasing her husband and leaving no heir. If this debt is expunged from the



schedule, no disadvantage will accrue to the wife unless of course her husband dies eventually in a penniless condition. It is not fair however to suspend his discharge on this account for the undetermined liability which may never arise, nor was the Court competent to make it a condition that he should furnish security for the amount of this liability. It could only have granted an order of discharge subject to any condition with respect to future income or with respect to after-acquired property, but the order under appeal has made no such conditions. I therefore dismiss the appeal of the wife and accept the appeal of the insolvent; but in order to safeguard the rights of his wife I order that she shall be granted an opportunity to apply to the insolvency Court for the expunging of the amount still due for deferred dower from the schedule, and that upon the expunging of this item an unconditional discharge shall be granted to the insolvent. The wife should make her application under S. 26 (2) within 30 days from the receipt of this record in the lower Court, or in default the application for discharge will be accepted. The parties can bear their own costs in both Courts.

R.M./R.K.

*Appeal allowed.***A. I. R. 1919 Lahore 140**

RATTIGAN, C. J.

*Ganesh Das and others—Defendants—Appellants.*

v.

*Kesho Das—Plaintiff—Respondent.*

Misc. First Appeal No. 2728 of 1918, Decided on 21st March 1919, from order of Senior Sub-Judge, 1st Class, Jhang, D/- 24th July 1918

**Civil P. C. (1908), Sch. 2, Para. 17—Party induced by misrepresentation to refer dispute to arbitration—He can revoke reference—Agreement cannot be filed in Court.**

Where a party has been induced by misrepresentation to refer a dispute to arbitration, he is at liberty to revoke the reference and the agreement to refer cannot be filed in Court.

[P 142 C 2]

The parties to a dispute referred it to arbitration, but almost immediately after the execution of the agreement of reference the defendants refused to act upon it and consequently the plaintiff, through his next friend, applied to have the agreement filed in Court. It was found that the defendants were induced to execute the document by misrepresentations on the part of the arbitrators and the plaintiff's friend:

*Held:* that under the circumstances the defendants were justified in refusing to abide by the agreement.

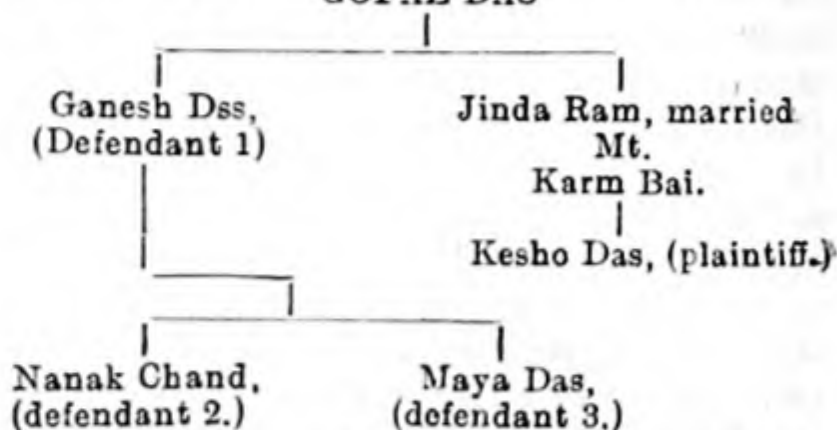
[P 142 C 2]

*Sheo Narain and Jagan Nath—*for Appellants.

*Tek Chand and Mehr Chand Mahajan—*for Respondent.

**Judgment.**—The following table explains the relationship of the parties:—

GOPAL DAS



From the evidence on the record it appears that after the death of Jinda Ram, plaintiff's father, disputes arose between his widow, Mt. Karm Bai, and Ganesh Das and his sons, the widow claiming that all the moveable and immoveable property in the possession of defendants was the property of a joint Hindu family of which the co-parceners were her son (a minor under her guardianship) on the one side, and Ganesh Das and his sons on the other side, each party being entitled to one-half. On the other hand, Ganesh Das and his sons denied that plaintiff's father had, at the time of his death, been joint with them, that the property belonged to a joint Hindu family of which plaintiff was a co-parcener, or that plaintiff was entitled to a half share in the said property. It is admitted that in these disputes between the parties, one Wali Ram (whose son had married the daughter of Jinda Ram, plaintiff's father) was a strenuous partisan of the widow Mt. Karm Bai and that the widow at first took action but unsuccessfully under the provisions of Act 19 of 1841. Subsequently in order to avoid unprofitable litigation, certain members of the brotherhood induced the parties to submit their differences to the arbitrament of Chaudhri Wazir Chand and Bhai Kala Ram, and after considerable discussion, an agreement was executed on 14th May 1917, the terms of which, as summarised by the Senior Subordinate Judge, were as follows:

"The whole matter in dispute between the parties with regard to the partition of all the moveable and immovable property of the joint Hindu family of the parties, no matter in whose



name or favour deeds or documents may be or in whose possession any property may be, shall be determined by two arbitrators, Chaudhri Wazir Chand and Bhai Kala Ram, whose decision shall be binding upon the parties, and they shall so decide the dispute that for the future none of the property shall remain joint; and in case of difference of opinion between the arbitrators Chaudhri Phiraya Lal will act as umpire and the decision of the majority shall prevail; and the agreement shall remain in the possession of Chaudhri Wazir Chand."

This agreement was signed by the widow and by all three defendants, but admittedly defendants (especially Maya Das), almost immediately after the execution of the deed, refused to act upon it, and on 17th May 1917 (three days after its execution) Mt. Karm Bai, as next friend of her minor son, Kesho Das, was obliged to apply to the Court of the Senior Subordinate Judge, under S. 17, Sch. 2, Civil P. C., that the said agreement should be filed in Court with a view to a reference being made to the aforesaid arbitrators. On receiving notice to show cause why the agreement should not be filed, the defendants appeared in Court and pleaded, in effect, that they had executed the agreement, but that the words "the property of a joint Hindu family" had been entered in the agreement without their consent; that on finding that the words in question had been entered in the deed, they had protested as the words amounted to an admission which they certainly would never have made; that they had at first refused to execute the agreement but that they were re-assured by the arbitrators, who said that they had already agreed to give "something" (or a lump sum) to the plaintiff, that there was no idea of partitioning the property and the agreement was in the form of a reference to arbitration merely to give greater security to the parties and that Chaudhri Wazir Chand would keep the deed with him. The Senior Subordinate Judge framed issues to cover the pleadings of the parties and in a lengthy judgment arrived at the following conclusions: (1) The defendants had failed to prove that the agreement was anything other than an ordinary agreement to refer a dispute to arbitration or that there was any kind of previous settlement to the effect that the arbitrators would give plaintiff merely a lump sum and would not partition the property; (2) that there was no evidence to prove either that the agreement

had been revoked by the defendants or that the arbitrators refused to proceed with the arbitration; and (3) that all defendants executed the agreement with full knowledge of its contents and that no fraud or deceit of any kind was practised upon them by Wali Ram or anybody else.

The learned Judge accordingly accepted the application of the plaintiff, ordered the agreement to be filed in Court and in pursuance of its terms appointed Chaudhri Wazir Chand and Bhai Kala Ram arbitrators and directed them to file their award in Court within one month. It was further ordered that in case the arbitrators could not agree, Chaudhri Phiraya Lal was to join them as umpire and that the decision of the majority should prevail. This order was dated the 24th July 1918, and on 22nd October 1918 an appeal was filed in this Court by Mr. Jagan Nath on behalf of the defendants. Subsequently on 23rd December 1918 Mr. Sheo Narain filed additional grounds of appeal. These grounds relate to questions of registration and jurisdiction, which were admittedly not urged in the Court below, were not taken in the original ground of appeal filed in this Court and were preferred at a time when limitation had expired for an appeal from the order of the lower Court. Mr. Tek Chand very naturally objected to my entertaining these grounds at this late stage but I find it unnecessary to deal with them, as I am of opinion that the appeal must succeed on the merits. I find it impossible to agree with the lower Court's finding that the defendants executed the agreement with full knowledge and approval of its contents and that no fraud or deceit of any kind was practised upon them. Nor can I follow the argument that the words "the property of a joint Hindu family" were inserted in the interests of defendants. It was plaintiff's mother and friends notably Wali Ram, who were insisting that the plaintiff was the member of a joint Hindu family and that the property in dispute was the property of such family, whereas defendants' contention throughout has been that plaintiff's father at the time of his death was not a member of the joint Hindu family and that the property in dispute was not the property of the joint family of which plaintiff and his father were members. It is impossible under



these circumstances to believe that the words to which defendants take objection were inserted in the deed by defendants or on their behalf.

On the other hand, the probabilities are certainly more in favour of Mr. Sheo Narain's arguments that Wali Ram had these words inserted in order to entrap defendants into an admission that the property belonged to a joint Hindu family. There is evidence to the effect that Maya Das defendant strenuously objected as soon as he heard the words read out and that his objection gave way only when he was informed by the arbitrators that they had practically decided to give plaintiff a lump sum and not to attempt any partition of the property in dispute. This seems to me a far more likely story than that of the plaintiff's witnesses, who would have us believe that the defendants, after emphatically denying that there was any joint family of which they and the plaintiff were the co-parceners, willingly acquiesced in the insertion of words in a deed by which the existence of a joint family was admitted.

Furthermore, no explanation is forthcoming to account for the very sudden change of front on the part of the defendants. On the 14th May they had, according to the plaintiff, readily accepted the agreement in every respect and yet on the very next day they flatly refused to proceed with the arbitration, thereby compelling plaintiff to come into Court on the 17th May with a petition praying that the agreement be made an order of Court. Defendants explain (and the explanation seems reasonable) that as soon as they had executed the document, Wali Ram made no secret of the fact that he had played a trick upon them and that it would be impossible for them now to contend that plaintiff was not a co-parcener and that it was in consequence of what they heard that they refused to go on with the proceedings.

The balance of probabilities seems to me on the side of defendants' story and as, I have said, plaintiff's version cannot account for defendants suddenly and without cause resiling from a position which they had taken up a day before.

The result is that I find that defendants, though they executed the document, were induced to do so by representations on the part of the arbitrators and plaintiff's friend Wali Ram and that these

representations were disowned by Wazir Chand and Wali Ram very shortly after the document had been executed. In other words, I hold that defendants' consent was induced by misrepresentations and that they were justified in refusing to abide by the agreement when they found that a trick of this kind had been played upon them.

I, accordingly, accept the appeal and reject plaintiff's application under S. 17, Sch. 2, Civil P. C. Plaintiff must pay cost throughout.

R.M./R.K.

*Appeal accepted.*

### A. I. R. 1919 Lahore 142

SCOTT-SMITH, J.

*Devi Dayal—Defendant—Appellant.*

v.

*Baini Ram—Plaintiff—Respondent.*

Second Appeal No. 250 of 1918, Decided on 10th June 1918, from decree of Dist. Judge, Ludhiana, D/- 12th November 1917.

**Contract Act (9 of 1872), S. 65—Contract not void but becoming impossible for unforeseen reasons—Money paid in advance cannot be recovered.**

A contract which at the outset is not void, but performance of which becomes impossible owing to an act of the executive authorities which could not have been foreseen at the time the contract was entered into, is governed by the principle "that the loss must lie where it has fallen," S. 65 being inapplicable, and money advanced under the contract before the date of the interpretation cannot be recovered.

[P 144 O 2]

*Tek Chand—for Appellant.*

*Fazl-i-Hussain and Badruddin Kureshi—for Respondent.*

**Judgment.**—Pandit Devi Dayal, defendant-appellant is the publisher of a vernacular almanac or jantri called *mu-fid-i-alam*. It was his custom to receive advertisements from various advertisers. In accordance therewith on 25th May 1915 there was an agreement between him and Baini Ram, plaintiff that the defendant would print certain advertisements in 60,000 copies of the Urdu jantri for the year 1916 and in 45,000 copies of the Nagri patra for Sambat 1973. Plaintiff alleged an advance of Rs. 660. It was said that his advertisements had not been printed in the Nagri patra at all, that they had been printed in the Urdu jantri but that the copies of it had been forfeited by Government and that therefore there had been no publication. He sued for recovery of Rs. 660. The allegations in regard to the Nagri



patra were found by the Courts below to be false and there is no dispute now in regard to this. As regards the Urdu jantri the first Court found that 60,000 copies were actually printed that some 56,500 copies were sold and that the defendant was not responsible for the act of the executive authorities in confiscating publication and therefore dismissed the suit. The lower appellate Court came to no finding as to how many copies were actually printed but says :

"The defendant has been able to account for the sale of 23,000 copies in all and assuming that each copy was incorporated with plaintiff's advertisements, it may therefore be concluded that he published only 23,000 advertisements of the plaintiff. In the absence of proof to the contrary, it can safely be presumed that the defendant failed to publish the rest either by reason of the confiscation of his jantri by Government or owing to the fact that he did not actually print more than 23,000 or 25,000 copies of it."

It held further that it was due to the defendant's carelessness and negligence in publishing certain objectionable matter in the jantri that the latter was confiscated and therefore he was liable to reimburse the plaintiff a sum proportionate to the number of copies which were not actually sold to the public. It gave the plaintiff a decree for Rs. 254 5-4 with proportionate costs. From the order the defendant appeals and plaintiff has filed a cross-appeal in which he asks for a further decree for Rs. 145-10-8. In another similar suit one Salig Ram sued the same defendant for Rs. 440 and obtained a decree for Rs. 271-5-4. In a third suit one Ghulam Ahmed sued the defendant for Rs. 168 and obtained a decree for Rs. 103-10-0. In each of these two suits cross-applications for revision have been filed Nos. 70,131,71 and 194 of 1918.

As the lower appellate Court has not come to any finding as to the number of copies actually printed, it will be well to clear the ground by arriving at a finding on this point. The first Court came to a clear finding that 60,000 copies of the jantri were actually printed. The lower appellate Court has not dissented from this finding. The evidence on which the first Court based its decision is referred to by it and I have heard it. I fully agree that it is proved that the full number of 60,000 copies were printed. In my opinion the lower appellate Court should have come to a decision on this point as it would probably have influenced its de-

cision on the second point, namely, as to the number of copies actually sold to the public.

Now taking into consideration the fact that 60 000 copies were actually printed, it appears reasonable to hold that they were all placed on the market for the purpose of sale and that most were sold. Only some 3,500 copies were recovered by the police from the defendant himself and a few were recovered from other sources. The defendant did his best by advertising and otherwise to recover the sold copies which he handed over to the authorities. If he had had a stock of unsold copies in his possession, it is reasonable to presume that he would have handed them over also. The publication (almanac), a copy of which is on the record shows on its title page that it is obtainable from a large number of booksellers and it appears probable that the copies were distributed to these persons for sale. The defendant has stated that his register of sales was taken away from him by the police and has not been restored to him. This has not been denied and it appears to be highly probable. It appears further prima facie probable that all the 60,000 copies of the jantri were sold except those—some 5,000 odd in number—which were made over to the authorities. All that the defendant undertook to do was to print the advertisements in his almanac and to put the latter on the market. This it is held he has done. The confiscation of the almanac has undoubtedly caused loss to the defendant and presumably to the various advertisers who have brought suits against him. The question is whether under the circumstances the defendant is liable to compensate the plaintiffs. In order to decide this the further question arises whether the confiscation of the almanac was due to the defendant's carelessness or negligence in inserting in it objectionable matter or matter which he knew or had reason to believe would render its confiscation probable. There is no proof on the record as to what the objectionable matter in the almanac was which led to its confiscation by the authorities.

All we know is that it was confiscated in accordance with the provisions of the Defence of India Act or the rules framed thereunder. It is not alleged that the defendant had committed any criminal offence or had inserted in the almanac



anything that would have been considered objectionable in times of peace. What is alleged is that he inserted in it objectionable predictions as to coming events. The almanac has been regularly published for several years past and and presumably these predictions are a feature of it and the plaintiffs must have known this. They gave their advertisements to the defendant with their eyes open. Under these circumstances it is difficult to see how he can be held liable to refund any of the money which he received for work which he agreed to do and did do so far as possible. The almanac was printed in September 1915 and was not confiscated by Government until three months later. After the date of the confiscation the continuance of the sale of the almanac was rendered impossible by causes over which the defendant had no control. It appears to me equitable that the loss in such a case should lie where it has fallen. No authority on all fours with the present case has been cited on either side. Counsel for Devi Dayal has referred me to a book entitled "The Law of War and Contract" by Campbell, in which on pp. 151 et seq. what are known as the Coronation Cases are discussed. These are cases which arose out of the postponement of the date of the Coronation of King Edward VII. The principle that in such cases the loss must lie where it has fallen was generally applied. In the Indian Contract Act by Cunningham in the commentary on S. 65, p. 259, the following passage occurs:

"In cases of this sort where the contract is not void at the outset, but in consequence of an accident further performance is excused, no remedy is according to the English authorities open to either party in respect of money advanced or work done under the contract before the date of the interruption. It is considered that restitutio in integrum is impossible and therefore in the absence of any express provision each party is left in the position which he occupied when the interruption took place."

The present case is not on all fours with the Coronation Cases, but at the same time I do not think it can be said to be governed by S. 65, Contract Act because the defendant carried out his part of the agreement by printing and placing on the market 60,000 copies of his almanac. *Boggiano & Co. v. Arab Steamers Ltd.* (1), which has been relied on by the lower appellate Court, is distin-

guishable from the present case, because there the shipping company which had received a payment in advance on account of freight had not done anything towards earning the money. The ship on which the goods were loaded did not leave the harbour and the voyage was abandoned, because the import of the goods into the country to which they were being sent was prohibited by orders of Government. That case was held to be governed by S. 65, Contract Act, which in my opinion does not apply to the present case. The fact that a certain number of the 60,000 copies of the almanac were never sold to the public or having been sold were recalled and destroyed, has been found to be not due to any fault or carelessness on the part of the defendant but to an act of the executive authorities which could hardly have been foreseen. Under these circumstances I hold that the principle that the loss must lie where it has fallen should be followed. I, therefore accept the defendant's appeal and, setting aside the order of the lower appellate Court, dismiss plaintiff's suit. His appeal is also dismissed. Under all the circumstances of the case, I think it equitable that the parties should bear their own costs throughout and I order accordingly.

R.M./R.K.

*Appeal accepted.*

### A. I. R. 1919 Lahore 144

ABDUR RAOOF, J.

*Sant Lal*—Appellant.

v.

*Ishar Das and others*—Respondents.

Misc. First Appeal No. 3135 of 1918,  
Decided on 20th February 1919.

Civil P. C. (1908), O. 39, R. 1—Injunction restraining alienation of property pendente lite can only be legally issued to person who is party to suit and in respect of property in dispute.

An injunction restraining the alienation of property pendente lite can only be legally issued to a person who is a party to the suit and in respect of property in dispute. Where therefore in an insolvency proceeding an injunction was issued to a secured creditor who had been paid off out of the sale-proceeds of the insolvent's estate restraining him from alienating his property till the final decision of the certain objections:

*Held:* that there was no warrant in law for such injunction. [P 145 C 1,2]

*Shamair Chand*—for Appellant.

*Ram Sarup* for *Ishar Das*—for Respondents.

**Judgment.**—Prima facie no appeal lies to this Court under S 46 (2) of Act 3



of 1907 but I grant leave to appeal under S. 46 (3). The order of the District Judge cannot be sustained in this case. One Bicha Lal was adjudicated an insolvent. Ishar Das was appointed the Receiver. He attached certain properties of the insolvent with a view to sell them and realize maney. A number of objectors came forward and filed objections. All those objections except one were disallowed. Thereupon objectors came up in appeal to this Court and the matter was remanded to the learned District Judge for disposal by a learned Judge of this Court. During the pendency of the proceedings before the District Judge the Receiver made an application to that Court with a very peculiar prayer. He stated in the petition that subsequent to the order of the District Judge disallowing the objection of the several objectors certain properties had been sold and out of the proceeds of those sales one Sant Lal a secured creditor had been paid off. He further stated:

"Now objections have been filed by the relations of the bankrupt and the file has been sent back by the Chief Court for reviewing the judgment. So if by any chance the objectors prove that some of the property sold by the Receiver belongs to them and so that might necessitate a refund of money by Sant Lal."

Upon this statement of the circumstances under which the application was made the applicant prayed that an injunction might be issued against Sant Lal restraining him from alienating any of his property till the final decision of the objections. This prayer has been granted by the learned District Judge and Sant Lal has therefore filed this appeal from his order. It has been contended before me that there is no warrant for such an order in the law. Under the Code of Civil Procedure order for an injunction can be issued only under certain conditions specified in O. 39, R. 1. Here the property of Sant Lal is in no way in dispute. The conditions mentioned either in Cl. (a) or Cl. (b) do not exist. Sant Lal was no party to the proceedings pending before the District Judge. Besides the ground upon which the application was made was not a ground upon which a Court could or ought to have granted an injunction. I allow the appeal and set aside the order granting the injunction against Sant Lal with costs in all Courts.

B.M./R.K.

*Appeal accepted.*

## A. I. R. 1919 Lahore 145

### Full Bench

RATTIGAN, C. J., CHEVIS, SCOTT-SMITH,  
LEROSSIGNOL AND BROADWAY, JJ.

*Mt. Mikor and others—Defendants—Appellants.*

v.

*Chhaju Ram—Plaintiff—Respondent.*

Second Misc. Appeal No. 1671 of 1918,  
Decided on 25th October 1918, from  
order of Dist. Judge, Karnal, D/- 4th  
December 1915.

(a) Custom (Punjab)—Ancestral property—  
Ancestral property left by deceased proprietor is not liable for just debt unless debt is expressly charged on land—Litigant can prove special custom that person in possession is legal representative of deceased

The decision of the Full Bench reported in 15 I. O. 866; is a perfectly correct exposition of the general rule that ancestral landed property left by a deceased male proprietor governed by custom is not liable in the hands of the next holder for a just debt, unless the debt has been expressly charged on the land. But it is always open to a litigant to plead special custom and prove that the person in possession of the ancestral property, which it is sought to attach, is the legal representative of the deceased debtor and that the property is deemed to be the property of the said debtor.

[P 146 O 1]

(b) Custom (Punjab)—Ancestral property—  
There is no universal rule that male owner has only life-interest.

Per *LeRossignol, J.*—There is no universal rule that among tribes that follow custom, a male owner of ancestral landed property has only a life-interest in that property and that on his death his interest lapses except in certain ascertained cases, e g., when he leaves a widow or when he has encumbered the property for sufficient and legal necessity.

[P 146 O 2]

15 I. O. 866 is misleading in that it lays down one universal principle and appears to hold that all the incidents of the tenure of a male owner of ancestral landed property have been exhaustively ascertained

[P 146 O 2]

(c) Custom (Punjab)—Special custom—  
Burden of proof is on party alleging.

The onus of proving special custom is on the party alleging it, at any rate in the case of parties who have not complete control over their ancestral holdings.

[P 147 O 1]

*Badr-ud-Din Kureshi*—for Appellants.

*Manohar Lal*—for Respondent.

*Chevis, J.*—This case and the connected cases have been referred to the Full Court in consequence of certain doubts having been expressed as to the correctness of the Full Bench decision published as *Jagdip Singh v. Bawa Narain Singh* (1). The only question is whether that decision is correct. After listening to the arguments of Mr. Manohar Lal who urges that the above

(1) [1912] 4 P. R. 1913=15 I. O. 866.



ruling is incorrect. I am still of opinion that the decision of the Full Bench is a perfectly correct exposition of the general rule. The nature of the holding of a male proprietor governed by custom has often been discussed, and I do not think it necessary to enter into a fresh discussion. For the reasons already given in *Jagdip Singh v. Bawa Narayan Singh* (1) I would hold that the decision given in that judgment is a correct exposition of the general rule. But it is always open to a litigant to plead special custom, and I would hold that the above ruling does not cover, and as the concluding paragraph shows does not purport to cover, cases in which the creditor can prove that by special custom the person in possession of the ancestral property which it is sought to attach is the legal representative of the deceased debtor and that the property is deemed to be the property of the said debtor.

**Rattigan, C. J.**—I agree.

**Scott Smith, J.**—So do I.

**Broadway, J.**—I agree.

**LeRossignol, J.**—*Jagdip Singh v. Bawa Narain Singh* (1) decides an abstract question of custom and inasmuch as custom is concrete and varies according to tribe and locality, I greatly doubt the desirability or utility of laying down abstract propositions relative to custom. In a question of custom, the issue will always be, not "what should be the custom?", but "what is the custom practised?" For many years past however this Court on inductive lines has sought to establish principles of custom; whether that policy of seeking out principles and extending custom on their basis was sound and whether the principles induced are correct, it is now far too late for us to retrogress, for after all an unsound rule which is certain and fixed is preferable to a sound rule impaired by uncertainty. One of the principles established by this Court and affirmed in *Jagdip Singh v. Bawa Narain Singh* (1) is that in agricultural communities following custom, a male owner of ancestral landed property had only a life interest in that property and on his death his interest lapses except in certain ascertained cases, e. g., when he leaves a widow or when he has encumbered the property for sufficient and legal necessity. This however though it

is of very wide application, is not an universal principle, for we are aware of cases even in the Central Punjab where such an owner has full control of his ancestral estate, and in the Western Punjab exceptions to this principle or rule are very common. In short, there is no universal rule even among tribes that follow custom rather than their personal law, and what the appellant asks us to hold to-day is that all the incidents of the tenure of a male owner of ancestral landed property are not yet ascertained and that even after his death his estate remains liable in the hands of his successors-in-title for his just though unsecured debts.

As to the equity of this view, there can be no question, and if it is correct, it constitutes a derogation from the principle that the estate we are discussing is a mere life-estate. Now my objection to the ruling, *Jagdip Singh v. Bawa Narain Singh* (1), is that it appears to decide that the incidents of all customary law are identical and it suggests, at any rate to me, that in no circumstances can a creditor show that his late debtor's ancestral estate is held by custom liable for that person's just debts. Speaking extrajudicially, I should say that custom, which though not always logical is generally fair, does recognize the liability of the estate for the deceased's just debts, and I cannot believe that in primitive times before the Courts meddled with custom, the people made any distinction between a just secured and a just unsecured debt. The distinction between secured and unsecured debts is a legal not a customary concept. My conclusion then with all respect is, that *Jagdip Singh v. Bawa Narain Singh* (1) is misleading in that it lays down one universal principle and appears to hold that all the incidents of the tenure of a male owner of ancestral landed property have been exhaustively ascertained. My objection to the ruling would at this late stage be insignificant, if the ruling had clearly set forth that the prevalent principle it affirmed could be modified by proof of a custom modifying that principle and I am persuaded that had inquiry into the actual custom, instead of a logical discussion, been the method employed in 1913, the custom would in all probability have been established.



The reasons for this belief of mine are, the equity of the custom contended for, the fact that a widow is permitted by custom not only to recognize a just unsecured debt of her deceased husband, but to convert it into a secured debt and even to encroach upon the future rights of the reversioners to secure its liquidation. Moreover the vast majority of the unsecured debts of childless male owners appear to be liquidated without reference to the Courts, whilst finally, cases, in which certain reversioners refuse to share the ancestral estate of a deceased owner with other reversioners equally entitled until the latter have contributed to the unsecured debts of the deceased liquidated by the reversioners in possession, must be within the experience of every Judge. If this custom is established, custom will then be not only equitable but in conformity with all recognised systems of law. Such an inquiry into custom at this time will be more difficult, for *Jagdip Singh v. Bawa Narain Singh* (1) and a very few cases which preceded it must have disturbed and obscured the real custom, if indeed the real custom is such as I believe it to be, but the position is not desperate.

As to the onus of proving the custom contended for, it cannot, in view of the rulings of this Court for many years, be on other than the party alleging it, at any rate, in the case of parties who have not complete control over their ancestral holding. With the foregoing remarks I adhere to the opinion of my learned brother Chevis.

R.M./R.K. *Answered in affirmative.*

### A. I. R. 1919 Lahore 147

SHADI LAL AND WILBERFORCE, JJ.

*Mt. Bhari*—Defendant—Appellant.

v.

*Khanun and others*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 211 of 1914, Decided on 24th April 1918, from decree of Divl. Judge, Jhelum, D/-8th November 1913.

(a) Custom (Punjab)—Succession—Non-ancestral property—Siviya Jats of Gujrat District—Collaterals of ninth degree suing sister of original holder—No entry in riwajiam—Burden of proof is on collateral—On failure to prove custom, collaterals cannot fall back upon personal law—Practice, New case.

Plaintiffs, collaterals in the ninth degree of one G., a Siviya Jat of Mauza Siviya in the Guj-

rat District, sued his sister to recover possession of property left by him. It appeared that the property was not ancestral qua the plaintiffs and that there was no entry in the Riwajiam favouring their succession.

*Held*: (1) that the onus was on the collaterals to establish a custom that they were entitled to exclude the sister; (2) that having failed to prove this custom, the plaintiffs could not fall back upon the personal law as furnishing the rule for decision, and that consequently their suit could not succeed. [P 147 C 2 ; P 148 C 1]

(b) Civil P. C. (1908), O. 1, R. 8 and O. 22, Rr. 4 and 9—Appeal—Death of some respondents—No application to bring legal representatives on record—Order permitting one or more respondents to represent all others shown to have been passed—Sufficient cause for not applying within prescribed period exists and period should be extended.

Where during the pendency of an appeal some of the plaintiffs-respondents died and no application was made to bring their legal representatives on the record within the period of limitation, but it appeared that the Court has made an order under O. 1, R. 8, Civil P. C., permitting one or more of the respondents to represent all the others:

*Held*: that under the circumstances there was sufficient cause for not making the application within the prescribed period and that the period should be extended. [P 148 C 1]

*Oertel*—for Appellant.

*Ganga Ram*—for Respondents.

**Judgment.**—The relevant facts of this case are set out in the order of remand dated 25th May 1917, which must be read as a part of this judgment. The question for determination is whether the plaintiffs, the collaterals of one Gaman, a Siviya Jat of Mauza Siviya in the Gujrat District, should, or should not, be preferred to his sister in the matter of inheritance to his landed estate. Now, considering that the property has not been proved to be ancestral qua the plaintiffs, that they are collaterals in the ninth degree, and that there is no entry in the Riwajiam favouring their succession, we concur in the view taken by Sir William Clark in *Bholi v. Kahna* (1) that the onus is on the collaterals to establish a custom that they are entitled to exclude the sister. It is perfectly clear that the plaintiffs have not adduced a single instance to show that the collaterals of the ninth degree exclude a sister from succession to non-ancestral property. The Court of first instance appointed a Munsif to make a local inquiry into the question of custom, and the report submitted by him discloses no

(1) [1909] 35 P. R. 1909=1 I. C. 695.



precedent, judicial or otherwise, in support of the plaintiffs' claim.

It is, however, contended that on failure to establish the custom set up by them the plaintiffs can fall back upon the personal law as furnishing the rule for decision. To this contention we are unable to accede. It must be remembered that the parties, who are Jats, are governed presumably by agricultural custom in the matter of inheritance; and indeed they appear to have placed their reliance upon custom. In these circumstances the plaintiffs' failure to prove a custom in favour of their claim does not lead to the conclusion that no custom regarding succession to the estate is applicable to the tribe and that the personal law must necessarily be followed. The only thing which can be said is that the custom set up by the plaintiffs has not been proved, and upon that finding their suit should be dismissed. It appears that some of the plaintiffs, who are respondents in this appeal, died during the pendency of the appeal, and it is contended by Mr. Ganga Ram that as no application to bring their representatives on the record has been made within the prescribed period, the appeal has abated so far as those respondents are concerned. From the affidavits filed by both the parties it appears that of the eight respondents, who died during the pendency of the appeal, four have got their legal representatives already on the record; and of the remaining four, Gaman, Alam and Khwaja died more than six months ago, and Hakam, son of Chanan, died according to the appellant six months ago, but according to the respondents about eight months ago. Mr. Oertel, however, argues that as an order was passed by this Court under O. 1, R. 8, Civil P. C., permitting one or more of the respondents to represent all others, the appellant did not consider it necessary to implead the legal representatives of those respondents who had been permitted to be represented by others. We think that the matter is by no means clear, and we are therefore of opinion that there was in the circumstances sufficient cause for not making the application within the prescribed period. Accordingly we grant the application for bringing the legal representatives of the deceased persons on the record. The result is that we accept the appeal and setting aside the decree of the

lower appellate Court dismiss the plaintiffs' suit with costs throughout.

R.M./R.K.

*Appeal accepted.*

### A. I. R. 1919 Lahore 148

MARTINEAU, J.

*Tikaya Ram—Defendant—Appellant.*

v.

*Wassu Misr and another—Plaintiffs and Defendants—Respondents.*

Second Appeal No. 3017 of 1917, Decided on 19th February 1919, from decree of Dist. Judge, Multan, D/- 29th June 1918.

**Evidence Act (1872), S. 115—Pre-emption—Dispute whether transaction was mortgage or sale—Compromise statement that plaintiff might be given decree subject to certain conditions—Conditions not fulfilled—Statement does not amount to waiver—Successor-in-interest is not debarred in subsequent suit from pleading that transaction was sale—Plaintiff cannot take advantage of his own fraud and show that transaction which was ostensibly mortgage was really sale.**

One T executed a mortgage deed in 1906 in the plaintiffs' favour in respect of a house which he afterwards sold to the defendant. Plaintiffs sued for a declaration that they were the owners of the house, alleging that the transaction of 1906 was really a sale and not a mortgage. It appeared that in a previous suit brought by one P for pre-emption of the house both T and the present plaintiffs had pleaded that the transaction was a mortgage. This case was compromised, T stating that the transaction might be treated as a sale and a decree given to P on condition of his closing a certain door and building a wall. The Court passed a decree in P's favour but omitted to mention the condition and P sought out execution and took over possession by paying the decretal amount. The present plaintiffs then applied to have the decree amended and the condition about the door and the wall was accordingly entered in the decree and as P was unable to comply with this condition, the executing Court had the possession of the house given back to the present plaintiffs.

**Held:** (1) that the statement made by T in the former suit was not an admission that the alienation of 1906 was in reality a sale and did not debar him or his successor-in-title from pleading that it was a mortgage. [P 149 C 2]

(2) that inasmuch as T merely consented to a decree being passed in favour of P subject to certain conditions, and P failed to fulfil these conditions, his suit in effect stood dismissed and T could not be said to have waived his rights in the house; [P 149 C 2]

(3) that inasmuch as the plaintiffs had on their own showing combined with P to defraud possible pre-emptors by having a sale transaction entered in the deed in the form of a mortgage, they were now estopped from setting up their own fraud and pleading that the transaction which was ostensibly a mortgage was really a sale; [P 150 C 1]

(4) that under the circumstances the plaintiffs' suit was liable to be dismissed. [P 150 C 1]



*Durga Das*—for Appellant.

*Nanak Chand and Bal Mukand Trikha*  
—for Respondents.

**Judgment.**—The house in dispute has been purchased by the defendant Tikaya Ram from the former owner Thallu Ram. The plaintiffs Wassu and Asa Nand sue for a declaration that they are the owners. Thallu Ram had executed a mortgage-deed in their favour in respect of the house in 1906, but their allegation is that the transaction was really a sale and not a mortgage. The lower Courts have decided in their favour, and Tikaya Ram has come to this Court in second appeal. Phallu Mal brought a suit for pre-emption in 1907 in respect of the alienation by Thallu Ram alleging that the transaction was sale. Both Thallu Ram and the present plaintiffs pleaded that the transaction was a mortgage. The case was compromised, it being agreed that Phallu Mal should be given a decree on condition of his closing a certain door and building a wall. Thallu Ram made a statement that the transaction might be treated as a sale and a decree given. The Court passed a decree in favour of Phallu Mal, but omitted to enter in the decree sheet the conditions as to the closure of the door and the building of the wall. Phallu Mal took out execution, paid the amount that he was required to pay under the decree, and got possession of the house, but did not carry out the conditions regarding the door and the wall.

Wassu and Asa Nand applied to have the decree amended, and it was amended accordingly, the conditions about the door and the wall being entered therein. After that, as Phallu Mal was unable to comply with the conditions (owing to objections raised by his father and brother) the executing Court, on the application of Wassu and Asa Nand, had possession of the house given back to them. The lower appellate Court holds that the appellant is estopped, by the statement which Thallu Ram made at the time of the compromise in 1907, from pleading that the alienation in favour of the plaintiffs was a mortgage, that Thallu Ram has waived his rights, and that the plaintiffs are in possession of the house as owners having got back possession from Phallu Mal, who was the owner under his decree. I do not agree with the view taken by the lower appellate Court. Thallu Ram made no admission in the former suit that the alienation

he had made in favour of the present plaintiffs was a sale. His plea was that the transaction was a mortgage and what he said at the time of the compromise was only that the transaction might be treated as a sale and a decree given to Phallu Mal (*muamala bai tasawwur ho kar muddai ko digri di jawo*).

I do not see how that statement can debar him or his successor-in-title from pleading, in a suit brought by the alienees, that the alienation of 1906 was a mortgage. The learned District Judge thinks that Thallu Ram's admission led the plaintiffs to take certain action which they would not have otherwise taken, namely, to get the decree amended and to get back possession of the house from Phallu Mal. It seems to me that this action was necessitated, not by Thallu Ram's statement which amounted merely to a consent to a decree being passed in favour of Phallu Mal, but by Phallu Mal's failure to fulfil the conditions of the decree. On the question of waiver the learned District Judge says that a right cannot be waived against one person and reserved against another. This is however not quite an accurate description of the position which the defendant is taking up. Thallu Ram could not, of course, relinquish his rights in the house and retain them at the same time, but did he relinquish them at all? He merely consented to a decree being passed in favour of Phallu Mal. If Phallu Mal had fulfilled the conditions of the decree, Thallu Ram's rights in the house would have ceased. But Phallu Mal did not fulfil the conditions and had in consequence to give back possession of the house to the present plaintiffs. In effect therefore Phallu Mal's suit stood dismissed and the status quo was restored. In these circumstances it cannot be said that Thallu Ram waived his rights in the house. The lower appellate Court has referred to the following passage of a judgment of the Privy Council reported as *Sri Gajapathi Radhika Patta Maha Devi Garu v. Sri Gajapathi Nilamani Patta Maha Devi Garu* (1), quoted in *1. L. R. 18 Mad. 1*:

"When a state of facts is accepted as the basis of a compromise is whereby a suit pending decision is amicably adjusted, and when the compromise is not vitiated by fraud, those who were parties to it and their privies should not afterwards be heard to say, for the purpose of reviv-



ing the controversy, that the real state of things was otherwise."

That principle however does not apply in the present case, as the compromise entered into in 1907 ceased to operate by reason of Phallu Mal not carrying out the conditions. I hold that Thallu Ram did not waive his rights in the house, and that his successor-in-interest is not estopped from pleading that the transaction of 1906 was a mortgage. The lower appellate Court thinks that because Phallu Mal got possession of the house as its owner the plaintiffs received it back from him as owner, but this is not correct. Phallu Mal did not become the owner, because he did not fulfil the conditions in regard to closing the door and building the wall, and he had no right to get possession at all. When possession was restored to the plaintiffs, owing to Phallu Mal not fulfilling the conditions, they took the house back with the same title that they had had before, the parties being relegated to the status quo ante, as I have already observed.

There is one other point urged on behalf of the appellant, which is alone a good defence to the suit, namely, that the plaintiffs cannot be allowed to plead their own fraud. They want to allege that they combined with Phallu Ram to defraud possible pre-emptors by having a sale transaction entered in the deed in the form of a mortgage. It is contended on their behalf that the fraud did not succeed, but this is not the case. Phallu Mal no doubt got a decree for pre-emption, but he got it subject to conditions which he found himself unable to fulfil, and so his case failed and he had to give up the house. The plaintiffs are now estopped from setting up their own fraud and pleading that the transaction which was ostensibly a mortgage was really a sale. I accordingly accept the appeal, set aside the decree of the lower appellate Court, and dismiss the suit with costs throughout.

R.M./R.K.

*Appeal accepted.*

**A. I. R. 1919 Lahore. 150**

SHAH DIN, C. J.

*Balwant Singh—Appellant.*

v.

*Mahindar Singh—Respondent.*

Misc. First Appeal No. 3158 of 1916,  
Decided on 23rd April 1917.

**Punjab Court of Wards Act (1903), Ss. 26 and 31—Execution of decree—Property of judgment debtor in charge of Court of Wards—Execution can be proceeded only on filing of certificate from Deputy Commissioner under S. 26.**

A decree was passed against B. on 11th May 1912. On 12th May 1914 his estate was placed under the superintendence of the Court of Wards. On 9th April 1915 the decree-holders applied for execution of the decree. On 1st January 1916 certain of B.'s property was attached but on 19th January 1916 the Deputy Commissioner, on behalf of the Court of Wards, objected to the attachment. On 20th April 1916 the executing Court ordered the decree-holders to amend their application and to make the Court of Wards a party to the execution proceedings. This was done on 26th April and a certificate dated 22nd March 1916 obtained from the Deputy Commissioner under S. 26, Punjab Court of Wards Act was filed along with the application :

*Held:* that since the decree-holders had filed the requisite certificate from the Deputy Commissioner, execution of the decree could issue and the executing Court had every power to issue attachment or other process against the property of the judgment-debtor which was under the superintendence of the Court of Wards. [P 151 C1]

*Sham Das—*for Appellants.

*Duni Chand and Rambhaj Datta—*for Respondents.

**Judgment.**—This appeal arises out of execution proceedings relating to a decree which was passed in favour of the respondents against appellant 1, on 11th May 1912. On 12th May 1914 the estate of the said appellant was placed under the superintendence of the Court of Wards. On 9th April 1915 the respondents made an application for execution of the decree but filed no certificate from the Deputy Commissioner under S. 26, Court of Wards Act, Punjab Act 2 of 1903, showing that their claim, as based on the decree, had been notified in writing to the Deputy Commissioner after the application of the notice under S. 9 of the Act. On 1st January 1916 certain property belonging to appellant 1, which was under the superintendence of the Court of Wards was attached in execution; but on 19th January 1916 the Deputy Commissioner, on behalf of the Court of Wards, objected to the attachment. On 20th April 1916 the executing Court ordered the respondents to amend their application for execution and to make the Court of Wards a party to the execution proceedings. On 26th April 1916 a fresh application for execution was made by the respondents in which both appellant 1, and the Court of Wards, which is appellant 2 in this



Court, were made parties; and a certificate, dated 22nd March 1916, obtained from the Deputy Commissioner under S. 26 of the Court of Wards Act was also filed along with the application. The appellants objected to execution of the decree being issued on the ground that since the property of the judgment-debtor had vested in the Court of Wards, the executing Court had no power to execute the decree against any portion of it and the respondents were bound to apply to the Deputy Commissioner for recovery of the decretal amount. The lower Court has overruled this objection by order dated 16th August 1916, and the present appeal has been preferred from that order.

In my opinion the order of the lower Court is fully justified under S. 31, Court of Wards Act, and must therefore, be maintained. Admittedly, the respondents filed, along with their application of 26th April 1916, a certificate from the Deputy Commissioner to the effect that they had notified their claim to him as required by S. 26 of the Act. Sub-S. (2), S. 31 has therefore no application to the case and under sub-S. (3) of the section the executing Court has every power to issue an attachment or other process in execution of the decree against the property of appellant 1, which is under the superintendence of the Court of Wards. The order of the lower Court under appeal is to the effect that since the decree-holders have filed the requisite certificate from the Deputy Commissioner execution of the decree can issue. This order is in full accord with sub S. (3), S. 31 of the Act, and the appeal must therefore fail. The question whether the lower Court can, after the property of the judgment-debtor has been duly attached, proceed to sell it in execution without the concurrence of the Court of Wards does not arise for decision at this stage of the proceedings and I am not called upon to decide it. I dismiss the appeal with costs.

R.M./R.K.

*Appeal dismissed.*

**A. I. R. 1919 Lahore 151**

SCOTT-SMITH AND WILBERFORCE, JJ.

*Mt. Raj Dulari—Appellant.*

v.

*Pala Mal and another—Respondents.*

First Appeal No. 592 of 1915, Decided on 19th February 1919.

**Hindu Law—Joint family — Suit by T against P for partition, for accounts of partnership and for dissolution — House property found to be family property—Mortgage by T of his share — Subsequently T held liable for certain sum in suit for accounts of partnership—P attached house property — Mortgagees objection allowed—In suit for declaration held family property was not liable for debts due on partnership accounts—P held to have no lien.**

T sued P in 1898 for partition of joint family immovable property and for settlement of accounts and dissolution of partnership. In 1901 the Chief Court gave him a decree, declaring that he was entitled to partition and that all houses in suit were the property of the joint family and liable to partition. Proceedings dragged on till 1907, when the District Judge ordered the receiver to proceed to divide the immovable property without deducting anything for debts due by either party. In February 1908 T executed a mortgage-deed in favour of the present defendant of his share. The receiver's scheme for partition was sanctioned by the Court on 27th July and the District Judge's order was maintained by the Chief Court on 1st November 1910. In a subsequent judgment of 3rd August 1914 the Chief Court held that the total amount due from T to P and others on account of the partnership was Rs. 4,246-11-3. An attachment of the mortgaged property took place in 1911 and P and others applied for sale of the attached houses. The mortgagee objected to the sale and the objection having been allowed, the decree-holders P and others brought the present suit for a declaration that they had alien on the property and had a preferential right to that of the mortgagees:

*Held:* (1) that the joint family immovable property had no connexion whatever with the partnership business and was in no way liable for any debts due on the partnership accounts; (2) that therefore the plaintiffs had no lien on the houses in suit and could not succeed.

[P 152 C 2]

*Ram Bhaj Datta and Shiv Narain—*for Appellant.

*Moti Sagar—*for Respondents.

**Judgment.**—The decision of this appeal, it is hoped, concludes litigation which commenced in 1898. In that year one Tek Chand sued Pala Mal and others for partition of joint family immovable property and for settlement of accounts and dissolution of partnership. The Chief Court on 7th December 1901 gave the plaintiff Tek Chand a decree for declaration that he was entitled to partition and decided that all the houses in suit were the property of the joint family and liable to partition. It also ordered that partition should be carried out in execution after it had been ascertained what amount of property remained to be divided. Proceedings dragged on slowly before a receiver till 1907 when certain directions were issued by



Mr. Ellis, District Judge, who ordered the receiver to proceed to divide the immovable property immediately without deducting anything for debits due by either party. He directed that any debits that might on account be found due could be deducted from any cash balance divisible and should not be considered in the division of the immovable property. He obviously considered that any debits due from any member of the family could be made good from the cash divisible. The receiver next on 24th January 1908 put in two schemes for the division of the house property. This was followed on 15th February 1908 by the execution of a mortgage-deed by Tek Chand in favour of the present appellant of his share for Rs. 5,000. The receiver's scheme for partition of the immovable property was sanctioned by the Court on 27th July 1908, and the District Judge's order on this point, which was not questioned on appeal to the Chief Court, was maintained by it on 1st November 1910. The Chief Court also held in a subsequent judgment of 3rd August 1914 that the total amount due from Tek Chand to Pala Mal and others on the partnership account was Rs. 4,246-11-3.

The present proceedings have arisen out of an attachment of the mortgaged property which took place in 1911, and an application by Pala Mal and others for the sale of the attached houses. The mortgagee raised objections to the sale of the houses and this dispute was decided in her favour by Murari Lal in 1912. The decree holders Pala Mal and another therefore sued for a declaration that they had a lien on the property and had a preferential right to that of the mortgagee. This suit has been decided in favour of the plaintiff in a somewhat indecisive judgment by the lower Court, which has held that the mortgage having taken place prior to final partition it could have no effect on the lien of the copartners. It has also held that the mortgage having been effected pendente lite cannot affect the rights of Pala Mal. Against this decision an appeal has been preferred to this Court. Counsel for the respondents does not attempt to support the finding of the lower Court that the doctrine of *lis pendens* applies in any way to the facts of this case and it is unnecessary therefore for us to discuss further the finding of the lower Court

on this point. Counsel for the appellant contended with force that the houses now in suit had no connexion with the partnership affairs of the parties. He pointed out that the original suit was for partition of joint family property and for dissolution of partnership and rendition of accounts and urges that the houses though part of the joint family property, had no connexion with the partnership concern. His contentions are borne out by the original plaint by the Chief Court judgment of 1901 and by the whole course of the litigation. It is most noticeable in this connexion that Mr. Ellis's judgment of 1907, in which he ordered the partition of the joint family houses to proceed separately from the settlement of the partnership accounts was never questioned in appeals to the Chief Court. Further it is significant that Pala Mal and others, when they applied for attachment of the property of Tek Chand, did not allege any lien on the houses in their capacity as partners. Against this position taken up on behalf of the appellant Counsel for respondents argued, on the basis of S. 262, Contract Act and Lindley on Partnership, p. 417, Edn. 8 and other authorities that the lien of one partner exists on partnership property till the conclusion of dissolution. It is not necessary for us to discuss the authorities, referred to as it is clear from the facts which we have mentioned above that the joint family immovable property had no connexion whatever with the partnership business. For these reasons it is obvious that Pala Mal had no lien on the houses now in suit. For the foregoing reasons we hold that at the time of the mortgage the joint family property was in no way liable for any debits due on the partnership accounts, and accepting the appeal dismiss plaintiffs' suit with costs in both Court.

R.M./R.K.

*Appeal accepted.*

### A. I. R. 1919 Lahore 152

BRODAWAY, J.

*Bashi Ram*—Auction-purchaser—Petitioner.

*Hassan Muhammad* and another — Judgment-debtor—Decree-holders—Opposite Parties.

Civil Revn. Petn. No. 92 of 1919, Decided on 27th January 1919.



(a) Civil P. C. (1908), O. 21, R. 90 — Objection on ground of fraud can be made only prior to confirmation of sale.

Objections to an execution sale on the ground of fraud can only be made under R. 90, O. 21, prior to the confirmation of the sale. [P 154 C 1]

(b) Civil P. C. (1908), O. 21, R. 90—Fraud—Plea of — Fraud should be specifically set out.

Fraud should be specifically set out with all the necessary details so as to enable the opposite party to meet a specific set of assertions.

[P 154 C 1]

(c) Civil P. C. (1908), O. 21, Rr. 90 and 92 and Ss. 100 and 115 — B obtaining decree against H, amount to be realised from property in event of non-payment — B having taken out execution, house of H sold and sale subsequently confirmed—H subsequently applying after 30 days for cancellation of sale on ground of fraud — Held that sale could not be attacked except by separate suit — No second appeal nor can appellate Court interfere in revision—Time cannot be extended under Limitation Act, S. 5.

One B. obtained a decree against H. the decretal amount being made realisable from the latter's property in the event of non-payment. B. having sued out execution, the house of H., was sold on 19th December 1916 and on 27th January 1917 the sale was confirmed in favour of one B. R., who was granted the usual certificate on 12th February 1917. On 1st November 1917 H. filed an application for the cancellation of the sale on the ground that it had been effected fraudulently and that the proceedings had been irregular. The Munsif dismissed the application as time-barred and as having been made after the decree had been satisfied. On appeal the District Judge, holding that the application was competent and within time, remanded the case for inquiry into the allegations made by H. The auction-purchaser B. R. preferred a second appeal against this order :

*Held* (1); that the sale having been confirmed, it could not be attacked except by a separate suit; (2) that the Munsif having acted under R. 92, O. 21, no second appeal was competent; (3) but that the appellate Court had power to interfere on revision; (4) that the application, having been made more than 30 days after the date of the sale, was time-barred under Art. 166, (5) that time could not be extended under S. 5 and in order to avail himself of S. 18 of the Act the applicant must show that he was by fraud kept from the knowledge of his right to apply for the sale to be set aside; (6) that the applicant having failed to establish this was not entitled to any relief.

[P 154 C 1, 2]

*Tek Chand*—for Petitioner.

*Shamair Chand* for M. L. Puri for Hasan Muhammad—for Respondents.

**Judgment.**—On 26th November 1915 one Beli Ram obtained a decree against Hassana on a compromise. The sum decreed was Rs. 243 and was payable by 26th April 1916. In default of payment the money was realizable from Hassana's house and other property. The money was not paid by the date fixed and on

27th July 1916 Beli Ram sued out execution asking for the sale of the house. The sale was effected on 19th December 1916, and the list of bids shows that the judgment-debtor was present at the time of sale. On 27th January 1917 the sale was confirmed in favour of Bashi Ram for Rs. 270 and on 10th February 1917 the record was consigned to the Record Room, the decree being stated to have been satisfied. Bashi Ram was granted the usual certificate by the Court on 12th February 1917. On 1st November 1917 Hassana filed an application for the cancellation of the sale on the grounds that it had been effected fraudulently and that the proceedings had been irregular. The application did not state under what provision of the Civil Procedure Code it was made.

On 6th December 1917 the learned Munsif dismissed the application, holding (1) that inasmuch as it had been made after the decree had been satisfied it was not competent; (2) that it was barred by time, and (3) no fraud had been proved. Hassana then appealed to the Additional District Judge, who held that the application was competent and apparently within time and remanded the case to the learned Munsif directing him to make an inquiry into the allegations made by Hassana. Against this order Bashi Ram has preferred this second appeal through Mr. Tek Chand and Mr. Shamair Chand has appeared for Hassana. Mr. Shamair Chand raised a preliminary objection to the effect that no second appeal lay. He contended that the application made by his client could only have been, and was, made under O. 21, R. 90, Civil P. C., and that the order of the Munsif was passed under O. 21, R. 92, Civil P. C., and was therefore appealable under O. 41, R. 1 (j), Civil P. C. He then contended that the order passed on appeal was final and referred to S. 104 (2), Civil P. C. He further contended that an application could be made under O. 21, R. 90, Civil P. C., on the ground of fraud at any time after the sale attacked had been confirmed and that in fact the only way to get a sale such as this set aside on the ground of fraud was by having recourse to the provisions of O. 21, R. 90, Civil P. C., as no separate suit could be brought. Mr. Tek Chand, on the other hand, argued that once a sale had been confirmed it could not be attacked except by a separate su



and that therefore no order could be passed under O. 21, R. 92, Civil P. C., and thus no appeal lay to the District Judge.

In any event, he contended that if no second appeal lay, this Court should act on the Revision Side. Having regard to the wording of O. 21, R. 92, Civil P. C., I am inclined to the view that Mr. Tek Chand's contention is correct, and that objections to a sale on the ground of fraud can only be made under R. 90 prior to the confirmation of the sale. At the same time, it seems to me that the Munsif was acting under R. 92 and that therefore no second appeal was competent and I therefore hold accordingly and dismiss the appeal as an appeal. I think however that I should interfere on revision—that I have the power to do so I have no doubt and it seems to me that this is a case in which I should exercise this power, for the reasons that this Court exercised it in Civil Revision No. 10 of 1919: *Asa Nand v. Jhanghi Ram* (1), decided by Chevis, J., on 3rd January 1919. The application is undoubtedly barred under Art. 166, Lim. Act, as having been made more than 30 days after the date of the sale. Time cannot be extended under S. 5 of that Act and S. 18 is the only section that can be appealed to. The learned District Judge has not referred to this section specifically, but I assume he had that section in his mind. In order to avail himself of that section however it is necessary for Hassana to show that "he was, by fraud, kept from the knowledge of his right to apply for the sale to be set aside."

He however has never alleged any such fraud. His allegation is that he had entered into an arrangement with Beli Ram under which Beli Ram undertook not to get the house sold and that despite this undertaking the house was brought to sale. Mr. Shamair Chand urged that the allegation was a general one of "fraud" which included this kind of fraud as well, but in this I am unable to agree. Fraud should, in my opinion, be specifically set out with all the necessary details so as to enable the opposite party to meet a specific set of assertions, and the only circumstance alleged by Hassana is that his decree-holder executed the decree in breach of an undertaking not to do so. The learned Judge appears to have gone out of his way to raise a case for the judg-

ment-debtor that he himself never contemplated and in doing so the learned District Judge has wholly misunderstood the real point regarding limitation. Incidentally, his order of remand is bad, for he has remanded the question of fraud for inquiry whereas the learned Munsif has already found that no fraud had been proved.

I accordingly accept this as a petition of revision and setting aside the order of the learned District Judge, restore that of the learned Munsif. The respondent must pay the petitioner's costs throughout.

R.M./R.K.

*Petition accepted.*

### \* A. I. R. 1919 Lahore 154

SHADI LAL AND LEROSSIGNOL, JJ.

*Harnam Singh*—Plaintiff—Appellant.

v.

*Kishen Chand and another*—Defendants—Respondents.

Second Appeal No. 1259 of 1915, Decided on 6th February 1919, from decree of Dist. Judge, Lahore, D/- 30th January 1915.

(a) Limitation Act (1908), Art. 11—Suit under O. 21, R. 63 after objection to attachment is allowed is governed by Art. 11—Civil P. C. (5 of 1908), O. 21, R. 63.

Plaintiff attached a certain house in execution of his decree against defendant, judgment-debtor, whose brother preferred objections on the ground that he was the sole owner of the property as the judgment-debtor had relinquished his interest in it by a deed of release. The objection having been allowed, plaintiff sued for a declaration that the house was liable to attachment and sale in execution of his decree:

*Held:* that the suit was governed by Art. 11, Lim. Act and having been brought within one year from the date of the order passed by the Court of execution, was not barred by time.

[P 155 C 2]

(b) Limitation Act (1908), Art. 120—Art. 120 applies when no other article is applicable.

Article 120 comes into operation only when no other article is applicable to a suit. [P 155 C 1]

\* (c) Limitation Act (1908), Art. 11—Art. 11 does not help where right is already extinguished by lapse of time.

A person cannot simply by invoking Art. 11 get over the law of limitation, if his title to the property has by lapse of time been extinguished. A suit though brought within the period allowed by Art. 11, may yet be barred by some other provision of the Limitation Act and may consequently fail on that ground. [P 155 C 1]

*Santanam*—for Appellant.

*Tek Chand and Mehr Chand Mahajan*—for Respondents.

**Judgment.**—In execution of a decree obtained by the plaintiff Harnam Singh

(1) [1919] 50 I. C. 610.



against Kishen Chand, on the strength of a mortgage-deed executed by the latter in favour of the former on 27th May 1897, the decree-holder attached the house in dispute. To this attachment Kishen Chand's brother Wasdeo preferred objections on the ground that the judgment-debtor had by a deed of release dated 3rd April 1896, relinquished his interest in the property, and that the objector was consequently the sole owner thereof. The Court of execution allowed the objections, with the result that the decree-holder brought the present action for the usual declaration that the house was liable to attachment and sale in execution of his decree.

Now the District Judge while deciding the case on the merits in favour of the plaintiff, has dismissed it on the sole ground that it is barred by limitation under Art. 120, because the plaintiff came to know of the deed of release in 1897 or 1898 and did not institute a suit within six years, as prescribed by that article to have it declared invalid. In this conclusion we are unable to concur. It is patent that Art. 120 comes into operation only when no other article is applicable to a suit. There can be no doubt that Art. 11 prescribes the rule of limitation for an action of this kind, and the present suit was undoubtedly brought within one year from the date of the order passed by the Court of execution. We fully recognize the principle that a person cannot simply by invoking Art. 11, get over the law of limitation, if his title to the property has by lapse of time been extinguished. A suit though brought within the period allowed by Art. 11, may yet be barred by some other provision of the Limitation Act and may consequently fail on that ground; but no such bar has been established by the defendant. It is to be observed that the farkhati relied upon by the defendant had never been put forward, prior to 1910, as an impediment in the way of the plaintiff, and the mere fact that as a witness in a case brought by one Maya Das the plaintiff became aware of the existence of the document did not render it obligatory upon him to sue for a declaration that it should not affect him prejudicially, more especially when we remember that in that very suit the transaction was declared to be fictitious. On the finding of the District Judge it

appears that the release was a mere paper transaction, and that the plaintiff instituted the suit within one year from the date when it was sought to be used as an obstacle in his way.

Accordingly we hold that the law of limitation does not furnish any bar to the plaintiff's suit which must be decreed upon the findings recorded in his favour by the District Judge on all other issues. The learned pleader for the defendant Wasdeo has attempted to impeach the findings adverse to his client, but he has not succeeded in establishing any ground which would be a good ground for a second appeal. On the question of the possession of the property the learned Judge holds that he was "not at all satisfied that Kishen Chand ever really left the house," and further it was the defendant Wasdeo who relied upon his adverse possession, which he has wholly failed to prove.

It is contended that the house belonged to a joint Hindu family, and that Kishen Chand being a member of that family could not validly alienate his undivided share in the joint property. A simple answer to this contention is that no such plea was ever put forward by the defendant and consequently no issue was framed on the subject. Nor was the claim to attach the entire house resisted on the ground that, apart from the title derived from the farkhati, Wasdeo was at any rate, entitled to a half share therein; and that the plaintiff could attach only the moiety belonging to his judgment-debtor. It appears that the house in dispute is a part of a large house, and that it was regarded as the property of Kishen Chand the remaining portion of the large house apparently belonging to Wasdeo. The facts in connexion with the matter are obscure and we are unable to express any final opinion thereon.

We accordingly accept the appeal with costs throughout.

R.M./R.K.

*Appeal accepted.*

**A. I. R. 1919 Lahore 155**

BROADWAY, J.

*Kirpa Singh—Plaintiff—Petitioner.*

v.

*Mula Singh—Opposite Party.*

Civil Revn. Petn. No. 288 of 1917, Decided on 30th November 1918, from order of Munsif, 2nd Class, Lyallpur, D/- 23rd January 1917.



Civil P. C. (1908), O. 9, R. 4, and S. 141—Application under O. 9, R. 4 dismissed for default—Fresh application to restore application is maintainable.

Where an application under O. 9, R. 4, to restore a suit dismissed for default is itself dismissed for default, a fresh application to restore such application is maintainable. [P 156 C 1]

*Nand Lal*—for Petitioner.

*Devi Dyal*—for Opposite Party.

**Judgment.**—The necessary facts are given in my order admitting this revision to a hearing. The case was originally fixed for hearing for 15th November 1916, and was dismissed in default. An application under O. 9, R. 4, Civil P. C., was filed on 13th December 1916, and was dismissed in default on 22nd December 1916. There is an application on the record bearing the said date (22nd December 1916) asking for restoration of the application of 13th December 1916 which was however dismissed on 23rd January 1917 on the ground that the application for restoration was filed on 3rd January 1917, i. e., more than 30 days after the dismissal on 15th November 1916. Mr. Nand Lal contended that the application dated 22nd December 1916 was for restoration not of the suit, but of the application to restore, filed on 13th December 1916, and that by virtue of S. 141, Civil P. C., such an application was competent.

The matter is not free from difficulty but *Manakji v. Surajmal* (1) is direct authority for Mr. Nand Lal's contention and I can see no good reason for regarding that decision as wrong. I accordingly follow it and accept this petition. The case will go back to the Court of the Munsif, who will decide whether there was any good or sufficient cause shown for the failure to appear on 22nd December 1916 and whether or not the application of that date should be granted. If he decides in the negative the matter ends, if in the affirmative then it will be for him to decide whether the application of 13th December 1916 was well-founded. Costs in this Court will follow the event.

R.M./R.K.

*Petition allowed.*

(1) [1911] 7 N. L. R. 32=10 I. O. 705.

## A. I. R. 1919 Lahore 156

BROADWAY, J.

*Mt. Gulab Devi*—Defendant—Appellant.

v.

*Monji Ram and another*—Plaintiff and Defendants—Respondents.

Second Appeal No. 2706 of 1918, Decided on 12th February 1919, from decree of Dist. Judge, Karnal, D/- 13th June 1918.

(a) Adverse possession—Proof—Use of land as "convenient adjunct" does not amount to assertion of title.

The use of land in a village as a "convenient adjunct" cannot be regarded as an indication of an assertion that the land so used is the property of the person using it. [P 157 C 1]

(b) Evidence Act (1872), S. 101—Person claiming title by purchase.

A person who sets up a title to property by purchase must prove that his vendor had a title in the property sold. [P 157 C 1]

*Shamair Chand*—for Appellant.

*Brij Lal*—for Respondents.

**Judgment.**—On 27th June 1916 one Harnath executed a deed of sale in favour of Chhelu, whereby he sold to him an ahata kham for Rs. 400. Chhelu erected a chhappar and other structures thereon and when he proceeded to make a door to the south, he was turned out by the defendants who claimed to be mortgagees in possession. Chhelu thereupon instituted this suit claiming to be restored to possession and was granted a decree, which decree was affirmed on an appeal filed by the defendants to the District Judge. The defendants have thereupon come up to this Court on second appeal though Mr. Shamair Chand and I have heard Mr. Brij Lal for the respondent. The case has been rendered difficult by the findings of the learned District Judge, which are to the effect that this ahata was part of the property mortgaged to the appellants in 1882, but that Harnath (who is a non-proprietor) acquired a title to it by taking hold of it as an occupancy tenant and holding it adversely for more than "12 years." The oral evidence has been disbelieved by both Courts and it is therefore difficult to understand on what material this finding has been arrived.

It seems clear that when this ahata was mortgaged to the appellants in 1883, there was a public way forming its western boundary. Harnath has built on the western portion of the ahata and has sold the eastern part to Chhelu, but



there is nothing to show when Harnath erected his house or in what way he acquired possession that can be regarded as having been adverse qua the portion sold. Admittedly when Chhelu purchased this ahata, it contained no buildings of any kind on it. Harnath has not been examined by either side, but his sister Mt. Gulab Kaur's evidence is against Chhelu. Now it was incumbent on the plaintiff to prove that his vendor had a title in the property sold [*Deba v. Rothagi Mal* (1)]. This, so far as the record is concerned, he has failed to establish. His house is to the north of this ahata and the learned District Judge seems to think that either he or Harnath had been using this site as a "convenient adjunct." Such user in a village however cannot be regarded as an indication of an assertion that the land so used is the property of the person so using it. I am unable to find any evidence on the record which can be regarded as proving that Harnath held possession of this site for over 12 years. I accordingly accept this appeal and setting aside the decrees of the Courts below dismiss the plaintiff's suit with costs throughout.

R.M./R.K.

*Appeal accepted.*

(1) [1906] 28 All. 479.

**A. I. R. 1919 Lahore 157**

BROADWAY, J.

*Ram Singh and others—Appellants.*

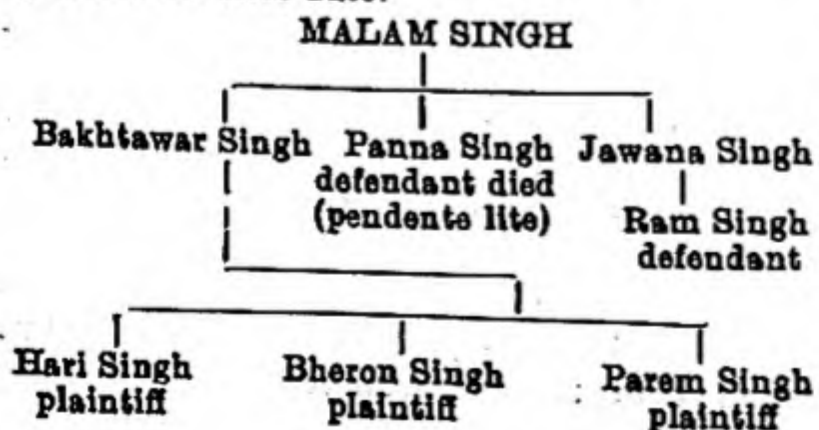
v.

*Hari Singh and others—Respondents.*

Second Appeal No. 1004 of 1918, Decided on 8th February 1919.

Custom (Punjab)—Adoption—Mohal Rajputs of Fazilka Tahsil.

There is no custom of adoption among Mohal Rajputs of the Fazilka Tahsil in the Ferozepore District. [P 158 O 1]

*Anant Ram and Rambhaj Datta—for Appellants.**Sheo Narain—for Respondents.***Judgment.**—The following pedigree-table will show the relationship of the parties to this suit:

The parties are Mohal Rajputs of Islamwala in the Fazilka Tahsil of the Ferozepore District. On 17th April 1913 Panna Singh executed a will, which was duly registered and in which he left his property to Ram Singh, alleging that he had adopted Ram Singh years before and had arranged for his marriage on 7th June 1915. Panna Singh executed a deed called a deed of adoption and stated therein that he had executed the will above mentioned. This deed was also registered. On 28th January 1916 mutation was sanctioned of a gift of land by Panna Singh to Ram Singh, the gift being an oral one. On 19th February 1916 the plaintiffs instituted this suit alleging.

(1) that the land was ancestral, (2) that there had been no valid adoption, (3) that Panna Singh had not the power to adopt, (4) that the gift was invalid, and (5) that the parties were governed by custom.

The defendants replied:

(1) that the property was not ancestral, (2) that an adoption had been made, (3) that Panna Singh had the power to adopt according to the custom of the tribe, and (4) that the adoption was valid both in law and by custom.

The Courts below have held that the property was ancestral and that no custom had been proved authorising the adoption. Ram Singh has therefore preferred this appeal to this Court through Mr. Ram Bhaj Datta and I have heard Pandit Sheo Narain for the plaintiffs-respondents. The only point argued at the Bar was whether or not a custom had been proved by which Panna Singh's adoption was valid. It seems to me that the decision of this question depends a great deal on the question of onus. The learned District Judge has held that the onus was rightly placed by the first Court on the defendant-appellant to show that there was a custom under which his adoption was valid. According to the latest riwajiam of the District no such custom exists, and Mr. Currie, the Settlement Officer, has noted that adoption is distinctly rare among all tribes in the Muktsar and Fazilka Tahsils. Fazilka Tahsil lies south of the Central Districts and it seems to me that the view taken by the Courts below is correct—and that in the present case it was for the defendant-appellant to



show that there was a custom by which his adoption was valid. Practically the only instance of an adoption is the one now in dispute and after a consideration of the evidence on the record (through which Mr. Ram Bhaj Datta took me) I am in agreement with the Courts below and hold that the defendant-appellant has not proved that among Mohal Rajputs of the Fazilka Tahsil the custom of adoption exists. I accordingly dismiss this appeal with costs.

R.M./R.K. *Appeal dismissed.*

### A. I. R. 1919 Lahore 158

CHEVIS AND SCOTT-SMITH, JJ.

*Emperor*

v.

*Amolak Ram*—Accused—Respondent.

Criminal Appeal No. 548 of 1918, Decided on 1st March 1919, from order of Sess. Judge, Montgomery, D/- 6th June 1918.

(a) Penal Code (1860), S. 193—Particular statement must be proved as false.

In a case under S. 193 it must be proved beyond all reasonable doubt that some particular portion of the statement alleged to have been made by the accused is false.

(b) Criminal Trial—Prosecution failing to produce important witness—Presumption should be drawn against prosecution.

Where the prosecution fail to produce an important witness, the Court is justified in making the presumption that if he were produced his evidence would not be favourable to the prosecution. [P 159 C 2]

*Harbert and Pindi Das*—for the Crown.

*Fazli-Hussain and Mukand Lal Puri*—for Respondent.

**Judgment.**—This case arises out of the attempted murder of Nau Nihal Singh half brother of Gurdit Singh, an Honorary Magistrate living at Kila Tara Singh in the Montgomery District. Sohan Singh turned approver and confessed that he had attempted to murder the boy at the instigation of Gurdit Singh. Gurdit Singh and others were tried and convicted by Mr. Parsons. In that trial Lala Amolak Ram Sub-Inspector gave evidence in the course of which he deposed that he left his headquarters (Dipalpur) for Salawal on the morning of 15th April 1916, and returned on the 16th that Muhammad Din constable did not bring Sohan Singh to him at all and that he did not see Sohan Singh, and that Sohan Singh was not detained at his house. Mr. Parsons, considering these statements

to be false, sanctioned a prosecution under S. 193, I. P. C. Amolak Ram has now been tried and convicted by Mr. Harris, Magistrate, and sentenced to two years' rigorous imprisonment. His appeal has been accepted and he has been acquitted by the learned Sessions Judge. This is an appeal by Government from the order of acquittal. The evidence in the case is voluminous, and no less than four days have been spent by us in listening to arguments. The case has been ably and exhaustively argued by learned counsel on both sides.

The case for the prosecution is as follows: When Sohan Singh returned to his village Dillewala (about 11 miles south of Dipalpur), rumours of what he had done to Nau Nihal Singh spread about and on 13th April 1916 Sohan Singh made a confession to Lal Singh Lambardar, who informed Lala Amolak Ram. The latter reported the story to the Superintendent of Police by letter saying in the letter that Gurdit Singh had come back. So apparently Amolak Ram was then under the impression that Gurdit Singh was at his village Kila Tara Singh (about two miles north-west of Dipalpur). On the morning of 15th April Amolak Ram sent out Muhammad Din constable to bring in Sohan Singh, Muhammad Din brought Sohan Singh into Amolak Ram's house. Sohan Singh was kept for 1½ or 2 hours sitting in the deohri. There he was seen by Baghi Ram and Bishen Singh who spoke to him, but Amolak Ram came out and drove them away. Amolak Ram kept Sohan Singh confined in his house that night, and all the next day till the evening, when Sohan Singh confessed and signed his confession recorded by the Sub-Inspector. Meanwhile Bishen Singh had sent off Hukum Chand, a cousin of Gurdit Singh, by the night train to Lahore to fetch Gurdit Singh to rescue Sohan Singh. Gurdit Singh left Lahore by the morning train of the 16th, reached Okara (a station about 16 miles from Dipalpur) at about 1 p. m., drove home and reached Dipalpur soon after Sohan Singh had confessed. He gave Amolak Ram a bribe of Rs. 1,600 in sovereigns, and got Sohan Singh released. On learning from Sohan Singh that a signed confession had been obtained from him, Gurdit Singh returned to Amolak Ram to get the confession, but was told it had been torn up. Not be-



lieving this he came again the next morning but got the same answer.

On 18th April he sent off Sohan Singh to Pakpattan where the latter put in a petition before the Subdivisional Officer complaining that the Dipalpur police, had shut him up and beaten him and had written a fictitious confession which he had been made to sign and thumb-mark. The petition accused the Sub-Inspector and the head constable, and asked that the papers connected with the matter might be sent for. The thana diary has an entry showing that Amolak Ram left Dipalpur for Salowal at 7 a. m. on the 15th and another showing that he returned at noon on the 16th. If he really was absent from Dipalpur from the morning of 15th April till noon on the 16th, then a large amount of Sohan Singh's story and a good deal of the prosecution evidence in this case must be false, and the whole case really sums up to this whether Amolak Ram was at headquarters the whole of the 15th and 16th, or whether he is telling the truth when he says he was away from the morning of the 15th till noon on the 16th. That Sohan Singh was called in from his village by Muhammad Din constable is not denied. It is also clear that he was detained there till the 16th though the defence version is that he was detained by Nathan Lal, the Head Constable, and that he was allowed to go before Amolak Ram's return on the 16th. That he was kept in Dipalpur that night is clear from the fact that Mul Singh, a defence witness, says Sohan Singh stayed the night though, of course, he says it was at Nathan Lal's house. About the following facts there can be no dispute. Gurdit Singh's servants found that Sohan Singh was in the hands of the Police and Hukm Chand was sent off to Lahore to fetch Gurdit Singh who came back by the train, reaching Okara at about 1 p. m. on the 16th. But for Gurdit Singh's return it seems impossible to suppose that either Amolak Ram or Nathan Lal would have allowed Sohan Singh to walk off, and though the only evidence as to the giving of the bribe is that of Sohan Singh—and he merely says he heard the clink of money passing hands, and was afterwards told by Gurdit Singh, about the bribe having been given—this part of the prosecution story at all events has the merit of being quite in accordance

with the probabilities of the case. The following witnesses are called to prove the presence of Amolak Ram at Dipalpur on the 15th and 16th. Bishen Singh, servant of Gurdit Singh, and Baghi Ram, a gomastha of Gurdit Singh, relate how they saw Sohan Singh in Amolak Ram's deorhi and how Amolak Ram came and sent them away. Lal Singh Lambardar says that on the 15th April he saw Sohan Singh being brought through the Dipalpur Bazaar by Muhammad Din. He also says he saw Sohan Singh in Amolak Ram's deorhi, and Amolak Ram was inside, but then he says he is not sure if this was the same day or not. In cross-examination he says Amolak Ram came out, and witness asked why he had been sent for and was told he had to take fodder to the Circle Inspector, but he says he is not sure whether this was in the morning or evening. This is not very satisfactory.

Muhammad Din constable swears he took Sohan Singh first to Nathan Lal's house, and then to Amolak Ram's house and handed him over to Amolak Ram and then came away. Nathan Lal says he questioned Sohan Singh in yai, and then sent him on to the Sub-Inspector in charge of Muhammad Din. He says he himself had fever. This witness's evidence is very unsatisfactory. And it must be remembered that his earlier statement made to the Hardwar Police in the inquiry about the Nau Nihal Singh's case was very different, viz., that the Sub-Inspector was not there (i. e., not at headquarters) and that he told Sohan Singh to appear before the Sub-Inspector the next day. Then comes a batch of witnesses, viz., Musa, Lambardar of Salowal, Nura of Salowal and Jamal Din, Lambardar of Kandowal, who swear that Hyder Ali constable had arrived at Salowal on the 14th to fetch them, and that Ram Surat constable also came on the 15th with summonses for Musa and Jamal Din, and that they went with the constables to Dipalpur, where the summonses were served, and the Sub-Inspector told them to compromise a certain case. Hyder Ali constable corroborates. Surat Ram has not been produced as a witness, and we see no reason for not making the usual presumption, viz., that if he were produced his evidence would not be favourable to the prosecution.



Lala Nihal Chand, Honorary Magistrate, deposes that he saw Amolak Ram at about 9 a. m. on the morning of the 15th. This evidence seems quite reliable so unless this witness's watch was fast Amolak Ram could not have left for Salowal as early as 7 a. m. Kesar Singh Reader to the Circle Inspector, says Amolak Ram did office work in Dipalpur on the 15th (The Circle Inspector was then on leave, and Amolak Ram was officiating for him).

So there is a considerable number of witnesses to swear to Amolak Ram's presence in Dipalpur on 15th April. We have to consider how far this evidence is reliable.

A question which suggests itself early in the case is this, why should Amolak Ram make false entries in the Thana diary as to his absence from headquarters, and what object had he in pretending that he was out on tour when he was all the while in Dipalpur? The prosecution theory is he wanted to get a bribe from Gurdit Singh, and so he got hold of Sohan Singh, knowing that news of this would soon reach Gurdit Singh who would be anxious to get Sohan Singh out of police clutches, and that in order to guard against having to go out to investigate any important crime which might be reported, he made an entry pretending that he had already gone out on tour. This theory does not seem very attractive to us. Important cases demanding instant personal investigation by the Sub-Inspector are not matters of every day occurrence, and if a report of any such case had happened to come in that day surely the Sub-Inspector could have invented an attack of colic, or some other excuse for not going out at once. It may further be asked, why should the Sub-Inspector have reported his return to Dipalpur before Gurdit Singh had turned up? The explanation offered is that Gurdit Singh did not turn up as soon as was expected, and so Amolak Ram feared to pretend absence any longer. But inquiries would soon tell Amolak Ram that Gurdit Singh was in Lahore, and if, as Bishen Singh and Baghi Ram's evidence shows, Amolak Ram knew that knowledge of Sohan Singh's being in police hands had come to Gurdit Singh's servants, Amolak Ram could easily guess that Gurdit Singh would be sent for at once, and might be expected to arrive at

Dipalpur on the evening of the 16th. There would surely be very little additional risk in delaying the report of his return to headquarters till the evening of the 16th or even the morning of the 17th. Seeing how near to Dipalpur Gurdit Singh's village is, it seems somewhat strange that Amolak Ram should have plotted to get a bribe from Gurdit Singh, and should have sent for Sohan Singh without first finding out whether Gurdit Singh was at home. But from Bishen Singh's evidence it would appear that even he, though a servant of Gurdit Singh, was not aware that Gurdit Singh was not at home.

Again, one would naturally expect that after making false entries in the Thana diary in order to pretend that he was not in Dipalpur the Sub-Inspector would wish to be seen by as few persons as possible. But according to the evidence he showed himself not only to Baghi Ram and Bishen Singh, but also to Lal Singh, Musa, Nura and Jamal Din, sending for them all, as if he wanted as many people as possible to be able to give evidence as to his presence in Dipalpur. It is said on behalf of the Crown that his pretence of absence was not really likely to be detected. But Kesar Singh, Reader to the Circle Inspector, might surely have noticed the fraud later on, when the Inspector returned and began to ask what had been done at Salowal, Kesar Singh would then very probably have said that so far from going to Salowal Amolak Ram had been doing office work in Dipalpur on the 15th. Bishen Singh in cross examination says that when he and Baghi Ram came to Dipalpur they met Muhammad Din, who said Sohan Singh would be found either at the house of Nathan Lal or at that of the Thanedar. Baghi Ram says that Muhammad Din's reply was that Sohan Singh might be at the house of the Chhota Thanedar, i. e., Nathan Lal. Hukam Chand, P. W. 5, in cross-examination says Bishen Singh and Ramditta told him that Nathan Lal had arrested Sohan Singh (here we follow the vernacular record, the English record, which is that Hukam Singh had arrested Sohan Singh contains an obvious error).

When Hukam Chand brought the message to Gurdit Singh in Lahore, Mt. Bhagwan Devi, mother of Nau Nihal Singh, was present. As soon as Gurdit



Singh was started on his journey, she sent off a telegram to prevent Sohan Singh's release. This telegram runs :

"Gurdit Singh coming, don't release Sohan Singh, take his explanation before Deputy Commissioner."

The significant point about this telegram is that it is addressed to "Nathan Lal Thanedar. The actual sender of the telegram, Lala Ram Nath (P. W. 17), is Mt. Bhagwan Devi's son-in-law. He says he meant the telegram, to reach either the Sub-Inspector or Nathan Lal. The witness is related to Nathan Lal. Seeing that Nathan Lal is often called the Chhota Thanedar, we think that the telegram was meant for him and that it was sent to him for the simple reason that Hukam Chand had brought the message that Sohan Singh was in Nathan Lal's hands.

We now turn to what happened at Pakpattan on 18th April. Sohan Singh, accompanied by Bishen Singh and Jawala Ram, a gomashtha of Gurdit Singh, went to Pakpattan, and first tried to engage a pleader, but could not agree as to fees. They then went off to a petition-writer, Lachmi Sahai (P. W. No. 9), and got a petition drawn up, which was presented to the Sub-Divisional Officer. This petition begins by relating how Gurdit Singh and his family, accompanied by Sohan Singh, went to Hardwar where the boy Nau Nihal Singh "strayed away and injured himself by an accidental fall", and was taken to Lahore for treatment. It goes on to say next that the relations between Sardar Gurdit Singh and the Police of Thana Dipalpur are strained, and then accused the Police of the Thana of having arrested Sohan Singh, kept him in confinement, beaten him, attempted to get a statement from him that Gurdit Singh had injured the boy, and had finally written a statement to which they had obtained Sohan Lal's thumb mark and signature, so fearing lest some further wrong action should be taken, Sohan Singh winds up with a prayer that all papers connected with the matter may be sent for from the Thana, and proper steps taken to prevent the Sub-Inspector and head constable from any further wrong doing.

What Gurdit Singh's object was in getting this petition lodged is difficult to say with any certainty. It is urged for the defence that if Gurdit Singh had

bribed the Sub-Inspector and succeeded in freeing Sohan Singh, he would scarcely be likely to take any steps which would probably result in further inquiries by Amolak Ram's superior officers; on the contrary, he would be only too anxious to hush the matter up. But he may have known that there was really no chance of the matter being hushed up. There was Nau Nihal Singh's mother, and also there was Lal Singh Lambardar, evidence of whose interest in the matter is forthcoming in the letter which he sent to Mr. Tomkins, and Gurdit Singh may have known that these two would be sure not to let the matter drop. If Amolak Ram really was keeping back a written confession, pretending that he had torn it up but really holding it in reserve to be used if necessary either to protect himself or to blackmail Gurdit Singh, still further, the object of the petition may have been to force Amolak Ram's hand. If he produced the confession he would be hard put to it to explain why he had let Sohan Singh go free. If he did not produce it he would have to deny its existence, in which case he would not be able to make use of it later on. But the important point of the petition, so far as this judgment is concerned, is that it accuses both the Sub-Inspector and the head constable of having arrested, confined and beaten Sohan Singh and obtained his signature to a statement. Both are named by office, not by personal names. Whereas the present story of Sohan Singh is that it was Amolak Ram alone who did all the wrong, Nathan Lal doing nothing beyond telling Muhammad Din to take Sohan Singh on to the Thanedar's house. Karm Chand, Pleader of Pakpattan, is one of the defence witnesses. He deposes :

"Sohan Singh told me that he had been beaten by the police and the police had forced a confession out of him. I asked him which police official had beaten him. He mentioned the name of Nathan Lal and one other police official, a constable, whose name I don't remember, I told him that they must have beaten him under the orders of the Thanedar. He replied that the Thanedar was not there."

Now if this evidence be true, why was the Thanedar also accused in the petition which was very soon afterwards dictated to the petition-writer? May it not be that Sohan Singh and his companions intended at first to charge Nathan Lal only, but after their conversation with Lala Karam Chand thought that their story would sound more probable if



they charged Amolak Ram also? We are not prepared to admit that Lala Karm Chand's memory may have failed him, for he gives definite and positive evidence. Either he must be lying or Sohan Singh must have told "the Thanedar was not there." So the case stands thus. The present evidence is directed solely against Amolak Ram, and it is at his house that Bishen Singh and Baghi Ram are said to have seen Sohan Singh. Whereas there is good reason to hold that the message sent to Lahore was that Sohan Singh was in Nathan Lal's clutches and Lala Karm Chand swears that Sohan Singh told him "the Thanedar was not there." The petition agrees with neither version, for it charges both Amolak Ram and Nathan Lal. Then we have what we regard as the improbability of Amolak Ram inventing a dangerous and probably unnecessary alibi, Amolak Ram getting false entries placed in the Thana diary as to his being out on tour on the very day when he was sending for Lambardars and others to come to him in Dipalpur. This to our minds renders the whole matter so doubtful that we are not surprised that the learned Sessions Judge gave Amolak Ram the benefit of the doubt.

That Jamal Din and Musa did come to Dipalpur on 15th April is clear enough; this is admitted. The summonses were served on them in Dipalpur by Surat Ram, and it may be asked how it was that they missed the Sub-Inspector on his way out to Salowal. But Jamal Din lives at Kandowal, a village near Salowal; there are separate roads from Kandowal and from Salowal to Dipalpur, the canal running between the two. If, as the defence allege, Musa went and picked up Jamal Din at Kandowal the party would come to Dipalpur from Kandowal, and would not meet the Sub-Inspector on the way. The prosecution version is that Jamal Din was called from Kandowal to Salowal before Surat Ram came out to call the parties but it is not clear that Hydar Ali had any instructions to call Jamal Din to appear before the Sub-Inspector. Hydar Ali says he handed Nadir's telegram back to the Sub-Inspector, but it does not seem clear what need there was ever to make over the original telegram to a constable.

Then it may be asked how, if, as is alleged for the defence, Ram Surat ac-

companied the Sub-Inspector to Salowal, he was back in Dipalpur on the evening of the 15th. But he had to serve summonses on Musa and Jamal Din, and finding on arrival at Salowal that they had gone to Dipalpur he may well have returned there. That he did go to Salowal on the morning of the 15th and returned to Dipalpur later on in the day is admitted; the only question is whether he went to Salowal alone or accompanied the Sub-Inspector there. We do not propose to examine the defence evidence. A good deal of it is improbable and unconvincing and Amolak Ram has signally failed to prove that he did any useful work either at Salowal, Sharin Muafi or Basirpur. But whatever may be said as to the defence evidence, we are not satisfied that the prosecution has proved beyond all reasonable doubt that Amolak Ram did not go out on tour from the morning of 15th April till noon on the 16th.

What really happened it is impossible to say, but it seems to us that the following is very possibly the real case. Amolak Ram and Nathan Lal, having plotted to blackmail Gurdit Singh, sent for Sohan Singh. Finding that Gurdit Singh was not likely to be back from Lahore till the afternoon of the 16th, Amolak Ram went on a lazy inspection tour, leaving Nathan Lal to detain Sohan Singh till his return. Bishen Singh and Baghi Ram saw Sohan Singh in Nathan Lal's custody and sent word to Gurdit Singh, who hurried back from Lahore. Meanwhile Amolak Ram had returned from camp, and getting the required bribe from Gurdit Singh let Sohan Singh go. If this be correct, then that part of Amolak Ram's statement before Mr. Parsons which says "Sohan Singh I never saw at all" is false, but the main portion as to Amolak Ram's going out to Salowal is true. But on the evidence as it stands, we are unable to say that it is proved beyond all reasonable doubt that any particular portion of the statement is false. There has been a great deal of hard swearing in the case, mainly on the question of Amolak Ram's being at Dipalpur or away from Dipalpur from the morning of the 15th to noon on the 16th April and the conclusion at which we arrive is that with regard to this question the defence version (viz., that Amolak Ram was not in Dipalpur) is very probably correct.



We accordingly uphold the decision of the learned Sessions Judge and dismiss this appeal.

R.M./R.K.

*Appeal dismissed.*

### A. I. R. 1919 Lahore 163 (1)

WILBERFORCE AND MARTINEAU, JJ.  
Ghasita—Appellant.

v.

Emperor—Opposite Party.

Criminal Appeal No. 468 of 1918, Decided on 4th December 1918, from order of Sess. Judge, Karnal, D/- 4th May 1918.

Penal Code (1860), Ss. 75, 379, 457 and 511—Exconvict entering thorned enclosure where sheep kept—Owner being disturbed he fled but was arrested—Conviction under S. 457/75 held bad—S. 75 held not applicable in case of attempt—Offence was under S. 379/511.

A previous convict entered an open thorned enclosure in which goats and sheep were kept, but on the owner being disturbed, he fled and was arrested near by. He was convicted under Ss. 457/75, I. P. C., and sentenced to transportation for life :

*Held* : on appeal, that the only offence of which he could be convicted was one of attempted theft under S. 379/511, I. P. C., and that as S. 75 did not apply to attempted offences, an enhanced sentence could not be inflicted upon him. [P 163 C 1]

Mul Chand—for the Crown.

**Judgment.**—In this case the appellant, a previous convict, has been sentenced under Ss. 457/75, I. P. C., to transportation for life. As for his guilt there can be no question. He is a resident of a different village and was arrested close to the spot and has been able to give no explanation whatever of his presence. The evidence against him is entirely independent and trustworthy. The Session Judge was however in error in holding the appellant guilty of an offence under S. 457 and applying S. 75 for purposes of an enhanced sentence. The appellant made his way into an open thorned enclosure in which goats and sheep were kept. The owner was disturbed before the appellant was able to carry out his object and the appellant fled. It is plain therefore that the appellant cannot be convicted of criminal trespass by night in a house or building and that the only offence of which he can be convicted is one of attempted theft under Ss. 379/511, I. P. C. It has frequently been pointed out by this Court e. g. *Jhamman Lal v. King-Emperor* (1) that S. 75 has no application to attempt-

(1) [1906] 14 P. R. 1906 Or. = 5 Cr. L. J. 85.

ed offences and that under such circumstances enhanced sentences cannot be inflicted.

We therefore accept the appeal to the extent that we alter the conviction to one under Ss. 379/511, I. P. C., and award the maximum sentence of 18 months' rigorous imprisonment.

R.M./R.K. *Appeal partly accepted.*

### \* A. I. R. 1919 Lahore 163 (2)

LEROSSIGNOL, J.

Mt. Karmon Bai—Defendant—Appellant.

v.

Chotha Ram—Plaintiff—Respondent.

First Appeal No. 480 of 1919, Decided on 3rd March 1919, from decree of Dist. Judge, Muzaffargarh, D/- 31st March 1913.

\* Civil P. C. (1908), O. 2, R. 2—R. 2 has no application to defence even if it may bar suit — Decree-holder attaching property which was already mortgaged and purchasing it subject to that charge—Mortgagee having already sued only for interest when he would have sued for interest as well as principal—Decree-holder cannot have benefit of O. 2, R. 2—He must pay off whole encumbrance as condition of entry.

Order 2, R. 2, has no application to a defence though it may bar a suit.

One C., having obtained a decree against T and A, attached the house in suit. Shortly before the attachment, the defendant, the widow of A had mortgaged the house for Rs. 1,200 carrying interest and on attachment the mortgagees put in objections reciting their mortgage rights, and the executing Court decided that the mortgage was a valid encumbrance and that the house should be sold subject to the mortgage charge. The decree-holder having purchased the house in execution sued for possession. The defendant demanded Rs. 1,560, the principal and interest due under the mortgage and alleged to be paid to the mortgagees. It appeared that one of the co-mortgagees had sued the defendant for interest without principal at a time when he could have sued for both :

*Held* : (1) that O. 2, R. 2, Civil P. C., had no application to the case and that if the mortgagees had shown any consideration to the defendant in the matter of interest, the plaintiff could not benefit thereby ; (2) that inasmuch as the plaintiff had purchased the house subject to a definite encumbrance, he was bound to pay the total sum due on that encumbrance as a condition of entry. [P 164 C 2]

Moti Sagar—for Appellant.

Ganpat Rai—for Respondent.

**Judgment**—This case has already been dealt with by this Court in Civil Appeal No. 1621 of 1914 of 30th May 1917 and again by the Bench order of 25th October 1918. The decree now in appeal is that of 31st March 1913 of the



Court of the District Judge (old style) and consequently a fresh number must be given to this appeal for the appellant party in Civil Appeal No. 1621 of 1914 is now the respondent. The facts of this case are simple. Chotha Ram, having obtained a decree against Topan Lal and Asu Lal, attached the house in Muzaffargarh District with which this case is concerned. Shortly before the attachment in 1900, the appellant, widow of Asu Lal, had mortgaged the house for Rs. 1,200 carrying interest, and the mortgagees, on attachment by Chotha Ram, put in an objection to the attachment reciting their mortgage right. The decree-holder alleged the mortgage was fictitious and the executing Court struck an issue on the point, but in the absence of proof of the decree-holder's contention, it decided that the mortgage was a valid encumbrance on the property and that the house attached should be sold subject to the mortgage charge. The house subject to that charge was accordingly put up to auction and was purchased by decree-holder for Rs. 1,000. He has now brought this suit for entry and this Court by its order of 30th May 1917 has held that a regular suit was open to plaintiff in his capacity of auction-purchaser.

The sole remaining point is what sum he has to pay on entry to the appellant who demands Rs. 1,560, the principal and interest of the mortgage, which she alleges she has paid to the mortgagees. The trial Court found that plaintiff was bound to pay Rs. 900 only because one of the co-mortgagees had sued defendant for interest without principal at a date when he could have sued defendant for both principal and interest and therefore any suit by him against defendant to recover his principal (Rs. 300) would now be barred under O. 2, R. 2. Interest was disallowed on the ground that defendant had failed to prove exactly how much interest she had paid. On a correct understanding of the position, it appears to me that the above considerations are beside the point. What did the plaintiff purchase? He purchased a house which was subject to a definite encumbrance. He did not purchase a property merely with notice of an alleged encumbrance which might or might not be fictitious. The matter was put in issue and no regular suit to challenge that

issue was brought within a year (Art. 11, Limitation Act).

The value of the property put up to auction was reduced by the charge which encumbered it and, but for the encumbrance, the price which plaintiff had to pay for the property would have been higher. Theoretically, the price, in the absence of the encumbrance, would have been the price paid plus the encumbrance money. Consequently, plaintiff neither on legal nor on equitable grounds can refuse to pay the Rs. 1,560 which defendant claims is due on the face of the mortgage. O. 2, R. 2, has no application to a defence, though it may bar a suit, and the mortgagees, all three, have deposed that the defendant has redeemed their mortgage. If they have shown any consideration to the defendant in the matter of interest, that consideration was intended for the defendant and plaintiff cannot benefit thereby. With regard to Rs. 900 decreed by the trial Court, the plaintiff did not appeal to the District Judge, so his decree as to Rs. 900 is final, but on the mortgage deed at least Rs. 1,560 are secured on the house and that sum plaintiff must pay as a condition of entry. I accept the appeal, modify the first Court's decree as above and direct that plaintiff must pay costs throughout.

R.M /R.K.

*Appeal accepted.*

### A. I. R. 1919 Lahore 164

SCOTT-SMITH AND WILBERFORCE, JJ.

*Autar Singh and others—Appellants.*

v.

*Harbhajan Das and others—Defendants—Respondents.*

First Appeal No. 883 of 1916, Decided on 10th February 1919, from decree of Senior Sub-Judge., Montgomery, D/-29th February 1916.

(a) Custom (Punjab)—Alienation—Widow—Necessity—In determining existence of valid necessity circumstances are relevant.

In order to determine whether a sale was effected for valid necessity, the circumstances of the vendor at the time of the sale ought to be examined. [P 168 O 1]

(b) Custom (Punjab)—Alienation—Widow—Necessity—Alienation to satisfy pressing demands of creditors—Widow not in favourable circumstances—Reversioners practically admitting debt at mutation—Suit after long delay—Vendees and reversioners cultivating together—Circumstances justified alienation and reversioners cannot succeed.

In a suit by the reversioners of a deceased proprietor for possession of certain land sold by his



widow, it appeared that at the time of the sale the widow was not in good circumstances but was in debt and being pressed by her creditors, sold the land to satisfy their claims, and that at the time of mutation the reversioners practically admitted the existence of debts. It was also found that the suit was brought 36 years after the sale and 9 years after the death of the widow and that the reversioners had all along been on good terms and had been cultivating jointly with the vendees:

*Held*: that the sale was for valid necessity and the plaintiffs could not succeed. (P 168 C 1)

*Sheo Narain, Sewa Ram Singh and Shib Das*—for Appellants.

*Gokal Chand Narang, Radha Kishen and Manohar Lal* for *Muhammed Shafi* for Respondents.

**Judgment.**—This is an appeal from the order of the Subordinate Judge of Montgomery, dismissing the plaintiffs' suit for possession of certain land situated in Mauza Mal sold by Mt. Thari, widow of Bhagwan Singh, to Mahant Santok Das for Rs. 1,000 on 29th June 1878. Plaintiffs 4—14 are the descendants of the brothers of Bhagwan Singh, and plaintiffs 1—3 are the sons of the late well known Sir, Baha Khem Singh, Bedi. They are financing the litigation, see the agreement dated 13th February 1914 printed at p. 17 of the paper-book. They have agreed to bear all the expenses of the litigation in consideration of receiving a half share in the land in suit, if they succeed in getting it. The original vendee Mahant Santok Das died long ago and was succeeded by Mahant Narain Das. The latter has also died and is now represented by Mahant Harbhajan Das, who holds the land in suit. Mt. Thari, the vendor, died nine years before suit. Seven issues were framed by the lower Court, but the chief one was No. 6: Was the alienation in suit for consideration and necessity? and this is the only one upon which arguments have been addressed to us. The lower Court found that the sale was for consideration and valid necessity and dismissed the suit. Plaintiffs have appealed and their appeal has been ably argued in this Court by Pandit Sheo Narain and Mr. Sewaram Singh, and we have heard Dr. Gokal Chand Narang on behalf of the defendant Mahant Harbhajan Das. The suit was instituted on 26th February 1914 or nearly 36 years after the date of the sale and, as already stated, nine years after the death of Mt. Thari. In these circumstances it is obviously difficult for the defendants to prove that the sale was

effected for valid necessity. The lower Court held that Mt. Thari at the time of the sale was not well off, that she owed debts and that she alienated the land in order to pay those debts, and that considering all the circumstances defendant 1 had quite sufficiently discharged the onus which lay on him to prove necessity for the sale. The Court also considered that the plaintiffs' long silence and the facts that since Mt. Thari's death they and the Mahant had been cultivating jointly, had been jointly making agreements in reference to dhart and along with him have been bringing cases against tenants, showed that they were all on amicable terms with him and that they considered the sale a good one and acquiesced in it.

Out of the consideration Rs. 100 is said to have been paid at the time of the sale and Rs. 900 afterwards. The evidence as to these payments is discussed in the judgment of the lower Court: see p. 245 of the paper-book. Counsel for the appellants has commented on the fact that though the sale-deed states that consideration has been received, yet as a matter of fact Rs. 900 out of it was not paid till more than a year afterwards and also on the fact that the agent of Mahant Santok Das sued Mt. Thari for produce of the land though he had not paid this sum. We do not consider it is necessary to discuss these matters. The eventual payment of Rs. 900 is clearly proved and Pandit Sheo Narain did not advance any arguments to the contrary. The real question which has to be considered is, whether there was valid necessity for the sale. The first matter which we have to examine in this connexion is Mt. Thari's circumstances at the time of the sale. The land in her possession at that time consisted of one-third of Mauza Shafi, of which the assessed land revenue amounted to Rs. 228-8-11. She also was in possession of the whole of Mauza Mal of which the land revenue was Rs. 180 10-7. The method of the lower Court's calculation of her income will appear at p. 246 of the paper-book. In the settlement of 1882 the land revenue payable was calculated on a basis of half the net profits of the land. The Court has therefore considered the assessed land revenue as equivalent to the landlord's income. This appears to us to be quite reasonable. No doubt this



method merely gives the approximate income of the proprietor, but it is not likely that it differs very largely from the actual income. Moreover, considering the fact that Mt. Thari was a lady of some position, who could not herself devote much attention to looking after land, we think it very doubtful whether her income exceeded the estimate arrived at by the lower Court. This was that her income was about Rs. 21 per mensem. This was certainly not much for a lady of her position who probably had to keep a servant or two, and also had to pay some one to look after the land. It would therefore not be surprising if she incurred debts.

The lower Court in its judgment (p. 246 of the paper book) states that three suits were brought against Bhagwan Singh, husband of Mt. Thari, in 1853 and that this fact shows that he was not a very wealthy man. Pandit Sheo Narain however argued that it is not proved that Bhagwan Singh, against whom the suits were brought, was the same Bhagwan Singh who was the husband of Mt. Thari. This is correct. We also agree with his contention that the mere fact that certain suits were brought against Bhagwan Singh would not in itself prove that he was in poor circumstances. Moreover it is quite possible that in 1853 he might have been unable to find ready money to discharge some of his debts, but from this it would not follow that his widow was in poor circumstances 25 years later. The lower Court has gone into Mt. Thari's circumstances at some length, see its judgment at p. 247 of the paper-book. The first three matters noticed by it are three decrees which were passed against her in 1862, 1866 and 1877 respectively for small amounts of land revenue. Pandit Sheo Narain urges that these decrees prove nothing and that they do not show that Mt. Thari was unable to pay the land revenue.

In our opinion it is unlikely that a lady of her position would have allowed decrees to be passed against her for small amounts of land revenue had she been possessed of sufficient funds to enable her to pay. Item (d) mentioned by the lower Court was a decree for Rs. 150 passed against her in favour of Chawa Singh in the year 1873. The decree was made payable in three annual instalments of

Rs. 50 each, and we agree with the lower Court that the fact that instalments were fixed shows that she was not in good circumstances and was unable to pay the amount in one lump sum. Item (e) was a registered deed of mortgage executed by her on 5th July 1873 in favour of Jhanda, agent of Lala Mehtab Rai, for Rs. 250, (Ex. D-14 printed at p. 54 of the paper-book). This debt is referred to in the subsequent registered mortgage-deed of 4th February 1878, Ex. D-15, item (g) on the lower Court's list. Moreover at the time of mutation of the sale now in dispute Mehtab Rai came forward and said that he had no objection to the sale so long as his debt of Rs. 424 was paid to him. Pandit Sheo Narain does not dispute the debt of Rs. 250, though he does not admit the balance which goes to make up the sum of Rs. 424 claimed by Mehtab Rai. The deed, item (g) on the lower Court's list, was not acted upon as pointed out by the lower Court.

It was apparently instead of it that Mt. Thari executed the sale-deed in favour of Mahant Santosh Das. Counsel on each side have advanced certain theories in explanation of the fact that this mortgage was cancelled, but we do not think it is necessary to discuss them. Mehtab Rai may have changed his mind as to the mortgage; we have nothing to do with the reasons which led to the cancellation of the deed in his favour. All that we have to consider is whether the sale in favour of Santosh Das was for necessity or not. Item (f) on the lower Court's list refers to the fact that Mt. Thari owned some land in Mauza Sombra but as she failed to pay the land revenue it was framed out by Government to one Arjan, who undertook to pay the land revenue. This fact certainly indicates that she was not in very flourishing circumstances. Items (h) and (i), on the lower Court's list deal with the mutation of the sale in question. At that time, as appears from the Tahsildar's report dated 25th March 1879, pp. 9 and 10 of the paper-book, Mt. Thari stated that she was selling the land owing to the demands of her creditors. It appears that her reversioners objected to her selling the land and said that they would pay her debts. It is noteworthy that they did not deny the existence of debts or say that the debts had been raised for an improper purpose.



We agree with the lower Court that at the time of mutation the Tahsildar understood that he had to make an enquiry as to necessity for the sale and that he satisfied himself that there were debts owing by Mt. Thari which she was unable to pay otherwise than by selling some of her land.

The Tahsildar also pointed out in his report that the reversioners were probably unable to pay the debts, and the fact that they never did pay them shows that they probably could not do so, certainly at or near the time of the sale. About 1886 the canal came into Mal and Shafi villages and the land immediately became very much more valuable. But at the time of the sale only a small area of land in each village was cultivated and the amount of the land revenue shows of what very poor quality the land must have been. A great deal of stress has been laid upon the fact that Man Das, agent of Mahant Santokh Das, admits that he made no enquiry as to Mt. Thari's debts. It is argued that having regard to the reversioners' objections at the time of mutation, the purchasers should have made full inquiries and should not have paid Rs. 900 until assured of the existence of just debts. It must however be remembered that the existence of debts, one of them being Rs. 424 was mentioned at the time of mutation.

The reversioners, as already remarked, did not deny the existence of debts, and we have no doubt that they knew all about them. There is ample evidence in proof of the debt due to Mehtab Rai, but with the exception of this, and of the balance due to Chawa Singh (Nanu, D. W. 8, says Rs. 60 was paid), it cannot be said that the other debts mentioned in the deed, Ex. D. 15, of 4th February 1878, have been proved. There is some evidence as to the item of Rs. 300 said to be due to Tara and Sohawa, but the evidence is not very satisfactory. Counsel for defendant-respondent has referred to a great deal of evidence oral and documentary, which shows that after Mt. Thari's death her reversioners and the Mahant cultivated the land of Mal village, jointly, entered into joint agreements as regards dhart, see pp. 75—78 and 98 of the paper-book, and spent money jointly on conducting a criminal case against Nabahu and others, see D. W. 42 and the

account at p. 162 of the paper-book. Counsel has also referred to the letters, Exs. D. 49 to D. 51, at pp. 96 and 99, which show that friendly relations existed between the Mahant and the plaintiffs subsequent to Mt. Thari's death. All these matters are certainly opposed to the view that the plaintiffs' reversioners had any intention of contesting the sale effected in 1878.

Plaintiffs 1—3 are very wealthy land-owners and have apparently got round plaintiffs 4—14 and have induced them to join them in the present suit. Plaintiffs 4—14, as the agreement printed at pp. 17 and 18 of the paper-book shows, ran no risk at all. All the expenses of the case are to be borne by plaintiffs 1—3 and if they are unsuccessful in it the costs of the other side are also to be borne by them. The only thing that plaintiffs 4—14 undertook to do was "to produce as much evidence as was required." They therefore ran no risks and had everything to gain by the present suit and nothing to lose. Plaintiffs 1—3 are mere speculators, who do not mind spending several thousand rupees on a suit of this sort; if they succeed, so much the better for them; if they fail, they can well afford the loss. We have no doubt that plaintiffs 4—14 would have brought no suit had it not been for these gentlemen's enterprise. The chief reason given why they did not bring a suit sooner was that they were too poor to do so. This plea, in our opinion, will not hold water. No doubt at the time of the sale they were not in good circumstances, for the land owned by them as well as that owned by Mt. Thari was of inferior quality and yielded very little. The canal however came about the year 1886 and the value of the land therefore largely increased as is apparent from the fact that the land now in suit which, calculated at thirty times the jama, was only worth some Rs. 1,600 at the time of the sale, is now worth Rs. 10,000 as is apparent from the plaint. Moreover after Mt. Thari's death plaintiffs 4—14 came into possession of two-thirds of village Mal; in other words, of twice as much land as that now in dispute.

They had therefore ample means to bring the present suit at any time during the nine years subsequent to Mt. Thari's death, even if it be supposed that they had no spare cash before that. It was



also urged that some of the letters produced by the defendants show that some of these plaintiffs were fighting among themselves that therefore there was no cohesion amongst them and that they could not join to bring a suit like the present. We do not think there is much force in this argument. It does not appear that there were any serious disputes between them and in any case some of them could have sued for their own shares independently of the others. To sum up. We consider it amply proved that Mt. Thari at the time of the sale was not in good circumstances, that she was in debt, that she was being pressed by her creditors and that she sold the land in dispute to satisfy their claims. In addition to the proved debts she alleged the existence of other debts also and we have no doubt that they did exist. We are fortified in this belief by the fact that the reversioners at the time of mutation practically admitted the existence of debts, by their long silence and especially by their conduct after Mt. Thari's death in living on good terms and cultivating jointly with the Mahant until plaintiffs 1—3 came along and induced them to bring the present suit. We hold therefore that the sale was for valid necessity and dismiss the appeal with costs.

R.M./R.K. *Appeal dismissed.*

### A. I. R. 1919 Lahore 168

RATTIGAN, C. J. AND MARTINEAU, J.

*Shahra and others* — Accused—Applicants.

v.

*Emperor*—Opposite Party.

Criminal Appeal No. 697 of 1918, Decided on 19th January 1919, from order of Addl. Sess. Judge, Multan, D/- 7th October 1918.

(a) Criminal P. C. (1898), S. 44—Person aware of intention to commit crime failing to give information is accomplice.

A person who is aware of the intention of certain people to commit a murder and does not disclose it to anybody is a consenting party to the crime and an accomplice and his evidence cannot be accepted without corroboration.

[P 168 C 2]

(b) Evidence Act (1872), S. 114—Accomplice.

The evidence of accomplices cannot be accepted as corroborative of each other. [P 169 C 1]

*Abdul Rashid and Muhammad Rafi*—for Appellants.

*Herbert*—for the Crown.

**Judgment.**—Sohrab, Biloch aged 25, Ramzan, Biloch aged 32 and Shahra, Jaura Jat aged 52, have been convicted by Additional Sessions Judge, Multan, of having participated in the murder of one Sohara on the night of 22nd July 1918 and have all three been sentenced to death. It is alleged that two other persons were concerned in the murder, Suleman, Jaura Jat who is said to be absconding, and Gehna who has turned approver and appeared as a witness in the case. The assessors were of opinion that all three appellants had murdered Sohara.

It appears that Suleman, Shahra and Gehna are related to each other and that Suleman had for some years past had an illicit intrigue with Mt. Hawa (P. W. 2) the wife of the deceased Sohara; that the appellant Shahra was on intimate terms with Mt. Hotani, the daughter of Sohara and Mt. Hawa, and that Mt. Hatoni and Shahra were anxious to marry each other and were supported by Mt. Hawa but that Sohara objected and had actually decided to betroth his daughter to one Budha, the son of Mt. Ghawar (P.W. 19). Mt. Ghawar deposes that the ceremony of betrothal was to have taken place two days after the date of the murder. The prosecution allege that Suleman, Shahra and Gehna conspired to murder Sohara in order that Suleman might marry Mt. Hawa and Shahra might marry Mt. Hotani. As regards Sohrab and Ramzan, it is said that some time previous to the murder, Suleman and Shahra had rescued, Sohrab and Ramzan from a recruiting party who were carrying them off and that it was in gratitude for this that Sohrab and Ramzan lent their aid to Suleman and his party.

It is clear from her evidence that Mt. Hawa knew all about the proposal to murder her husband and that she was a consenting party to the commission of the crime. In the circumstances we think that Mr. Abdul Rashid, appellant's counsel is fully justified in describing her as an "accomplice," regard being had to the provisions of S. 44, Criminal P.C., and the definition of abetment in S. 107, I. P. C. Gehna (P. W. 1) is admittedly an accomplice and in addition to his complicity in this cold-blooded murder, he had for some time past been a student in the art of thieving under the guidance of Suleman. Both Gehna and Mt. Hawa



are thus persons utterly devoid of any sense of morality and it would be impossible to accept their evidence either as corroborative of each other or as sufficient apart from independent corroboration to justify the conviction of any of the accused. The case against the three appellants has been summarised by the learned Additional Sessions Judge and it will appear from his judgment that as against Sohrab there is apart from the evidence of Gehna and Mt. Hawa, a statement by Mt. Hotani to the effect that on the morning after the murder Shahra came to her mother's house and stated that Sohrab had been murdered by himself, Sohrab, Ramzan, Suleman and Gehna. It is also said that Sohrab confessed his crime to the Lambardar Allah Dad, who gave evidence before the committing Magistrate but was too ill to appear in the Sessions Court, and that it was Sohrab who pointed out to the police the place where the body of the deceased had been thrown into the canal and that near to that spot a shoe and a chadar belonging to the deceased were found. In our opinion the statement by Shahra to Mt. Hotani is worthless as a piece of evidence against Sohrab and we find that the learned Judge himself does not attach much importance to it.

As regards the alleged confession to Allah Dad, we find from a reference to the zinnis that when Sohrab and Ramzan were produced before the police by Allah Dad, the latter informed the police that neither of the two would make any statement. In face of this it is impossible to accept Allah Dad's subsequent evidence that though Ramzan denied any knowledge of the affair, Sohrab confessed his guilt to him. Nor can we accept the evidence that it was Sohrab who pointed out the place near to which the deceased's shoe and chadar were found. Kabul (P. W. 12), who went into the water and found the shoe, distinctly says that it was Gehna who gave information with regard to the post.

The committing Magistrate has recorded a note to the effect that Sohrab was willing to confess if he were granted a free pardon, but it is impossible to say what Sohrab would have disclosed had a pardon been tendered to him and we cannot assume that he was prepared to admit participation in the murder. As a matter of fact he made no confession

and asserted his innocence. In our opinion there is no sufficient evidence to justify the conviction of Sohrab and the case against Ramzan is even more slender as the only evidence against him is the statement of Gehna supported by the statements of Mt. Hawa. As regards these two, Ramzan and Suleman we might also point out that they are in no way related to Suleman, Shahra and Gehna and that they had no direct motive for participating in this murder.

As regards Shahra the case is different. So far as he is concerned the motive was strong and urgent, inasmuch as the betrothal ceremony of Mt. Hotani was fast approaching and Sohrab had shown his determination not to allow his daughter to marry Shahra. The evidence of the approver and of Mt. Hawa is corroborated by the evidence of Mt. Hotani, who had obviously no reason for deposing falsely against her lover. She deposes that on the morning after her father had disappeared, Shahra admitted that he and others had murdered him. It is argued that Mt. Hatoni was also fully cognizant of the plan to murder her father and that her evidence is better than that of her mother. It is true that Gehna has stated that Mt. Hotani knew about the plan and was at one with her mother upon the subject, but he admittedly received this information from Suleman and had no personal knowledge on the subject. Apart from Gehna's hearsay evidence on this point, there is nothing in the evidence on the record to support the allegation that the daughter had any knowledge that her father was to be murdered and a reference to the police papers makes it perfectly clear that until Shahra arrived on the morning after the murder, Mt. Hatoni was ignorant of the facts and anxiously inquiring from her mother as to the whereabouts of her father and when he was to return.

We hold therefore that the case against Shahra has been established and we reject his appeal and confirm the sentence of death in his case. Sohrab and Ramzan's appeals are accepted their convictions set aside and they are acquitted.

R.M./R.K.

*Order accordingly.*



## A. I. R. 1919 Lahore 170

BROADWAY, J.

*Gopal Shah*—Defendant—Appellant.

v.

*Jawand Singh and others* — Plaintiff and Defendants—Respondents.

Second Appeal No. 2631 of 1918, Decided on 31st January 1919, from decree of Dist. Judge, Sialkot, D/- 14th May 1918.

**Hindu Law—Joint family — Acquisitions made by members are presumed to be made from joint funds and to belong to family — Acquisition in name of particular member does not warrant assumption that it is his exclusive property.**

The legal presumption is that all the properties held by any member of a joint family, so long as the family is joint, are joint properties and that acquisitions made by the several members in a joint family, while the family is joint, are presumed to have been made from joint funds and belong to the joint family. The onus lies on the party who asserts self-acquisition. The mere fact that any particular acquisition is in the name of a specific member of the joint family does not warrant the assumption that it is the exclusive acquisition of the member named and not of the whole of the joint family. [P 170 C 2]

*Gokal Chand Narang*—for Appellant.*Tirath Ram*—for Respondents.

**Judgment.**—The facts of the case out of which this appeal has arisen are briefly these:

Gopal Shah appellant obtained a decree against Ghasita and others and in execution of the same attached (1) a shop and (2) certain mortgagee rights in a house. The plaintiffs-respondents filed objections which were disallowed and they then instituted this suit, praying for a declaration that neither the shop nor the mortgagee rights in the house were liable to be attached and sold on the ground that they had purchased these from Ghasita to whom they had belonged. The trial Court held that Ghasita was a member of a joint Hindu family and that he was only entitled to a one-third share in these properties, and the plaintiffs had only purchased Ghasita's one-third share in them. Against this decision Jawand Singh one of the plaintiffs preferred an appeal to the learned District Judge and Gopal Shah filed certain cross-objections. The learned District Judge held that it had not been proved that Ghasita had owned more than one-third of the shop, but that he had been the sole owner of the mortgage rights in the house. Gopal Shah has therefore come up to this Court in second ap-

peal through Mr. Gokal Chand Narang and I have heard Mr. Tirath Ram for the respondents. The only point for determination is whether the learned District Judge has rightly decided the dispute relating to the mortgagee rights in the house. For the appellant it has been contended that having held that Ghasita was a member of a joint Hindu family, the learned District Judge has raised wrong presumptions and failed to appreciate that the onus lay on the plaintiff-respondents to prove that these mortgagee rights were self-acquired and did not form a part of the joint family property.

Now these mortgagee rights were acquired in 1870 by Ghasita's father at a time when the family was joint, but says the learned District Judge:

"The fact that the family was joint is no reason for holding that I can see that when the deed distinctly mentions Ghasita's (father), one of the members of the joint family, it means the whole of the family or that he was acting on behalf of the family. The fact that he was a member of the joint family is no reason why he should not acquire independent rights in property and the contents of the old mortgage being that he did do so, I do not think there is any reason to hold that the intention was to vest the mortgagee rights in the joint family."

It seems to me however that the learned District Judge has lost sight of the fact that the legal presumption is that all the properties held by any member of a joint family, so long as the family is joint, are joint properties, and that acquisitions made by the several members in a joint family, while the family is joint, are presumed to have been made from joint funds and to belong to the joint family. The onus of proof lies on the party who asserts self-acquisition: see *Nanak Chand v. Lachhman Das* (1) and Mulla, pp. 192, 193. Again the mere fact that any particular acquisition is in the name of a specific member of the joint family does not warrant the assumption that it is the exclusive acquisition of the member named and not of the whole of the joint family. In the present case it has been held that the family was joint in 1870 and that there had been no disruption or partition since. It has also been held that this joint family owned property—the presumption is therefore that this property was joint. The onus lay on Ghasita or his successors in-interest to show that this mortgage was for his

(1) [1917] 82 P. R. 1917=40 I. O. 775.



benefit alone and not for the benefit of the joint family. The fact that the mortgage was in the name of Ghasita's father is not a sufficient rebuttal of the legal presumption that arises. In these circumstances I accept this appeal with costs and setting aside the order of the learned District Judge, so far as the mortgagee rights in the house are concerned, restore that of the trial Court.

R.M./R.K. *Appeal accepted.*

### A. I. R. 1919 Lahore 171

SHADI LAL, J.

*Tara Chand Ghansham Das*—Appellants.

v.

*Jugal Kishore*—Respondent.

Misc. First Appeal No. 2568 of 1917, Decided on 18th January 1919, from order Sr. Sub-Judge, Rohtak, D/- 10th July 1917.

Limitation Act (1908), S. 15 and Art. 182—Application for execution of decree against firm B. L. J. K.—Application struck off judgment-debtor being declared insolvent—Subsequent decision by insolvency Court that B. L. sole proprietor of firm was alone declared insolvent—Fresh application by decree-holder for execution of decree filed after period of limitation—Proceedings in execution were not barred—Even if second application be regarded as fresh application period during which execution was stayed could be excluded.

A decree-holder applied on 30th August 1912 to execute his decree against the firm of B. L. J. K. The judgment-debtor having been declared insolvent, the application was struck off the list on 1st October 1912. In the insolvency Court a controversy arose as to whether B. L. was the sole proprietor or whether J. K. had also been adjudicated insolvent. On 3rd April 1916 the Court decided that B. L. was the sole proprietor of the firm and that he alone had been adjudicated insolvent. On 19th April 1917 the decree-holder applied to execute the decree, but his application was dismissed as barred under Art. 182. On appeal.

*Held*: (1) that the proceedings in execution were not barred, inasmuch as the application of 30th August 1912 not having been disposed of, the later application was one to revive or carry through a pending execution suspended by no act or default of the decree holder, and that proceedings could be taken against J. K.; (2) that even if the second application could be regarded as a fresh application then under S. 15, Lim. Act, the period between 1st October 1912 and 3rd April 1916, during which the execution had been stayed by order of the Court, should be excluded.

[P 171 C 2]

*Gullu Ram and Devi Dayal*—for Appellants.

*Tek Chand and Shamair Chand*—for Respondent.

**Judgment.**—The question for determination in this appeal is, whether certain proceedings in execution were barred by limitation as falling under Art. 182, Lim. Act, 1908. The material facts are few and may be stated briefly as follows: On 6th June 1912 the appellants obtained a decree for a certain sum of money against the firm Bhicha Lal Jugal Kishore, and it was described in the decree that the firm comprised Bhicha Lal, his son Jugal Kishore, and other persons as partners. It is common ground that the respondent, Jugal Kishore, was one of the judgment-debtors.

On 30th August 1912 the decree-holders made an application for executing the decree against Bhicha Lal Jugal Kishore, but on 1st October 1912 the Court passed an order striking the case off the list (dakhil daftar howe) on the ground that the firm had been adjudicated an insolvent and that the decretal amount had been entered in the schedule of debts. It appears from the record of the insolvency Court that there was a controversy as to whether Bhicha Lal was the sole proprietor of the firm, or whether Jugal Kishore was also declared an insolvent, in consequence of the order of the insolvency Court. The matter was not finally set at rest until 3rd April 1916, when the Court decided that Bhicha Lal was the sole proprietor and that the order of adjudication applied to him and not to any other person. The application now under consideration was made on 19th April 1917, and the Subordinate Judge has given effect to the objection that it is barred by time under Art. 182, Lim. Act. I have listened to the arguments advanced on both sides and reached the conclusion that the order of the Subordinate Judge is wrong and must be set aside. I consider that the application of 30th August 1912 was never finally disposed of, and that the application of April 1917 was in substance an application to revive and carry through a pending execution which was suspended by no act or default of the decree-holders. It is perfectly clear that the order of 1st October 1912 constituted an obstacle in the way of the decree-holders, and that as long as that order was in force they could not ask the Court to execute their decree.

Mr. Tek Chand for the respondent contends that the application of 30th August



1912 was not made against Jugal Kishore and that so far as the latter is concerned the present application is the only application for execution. This contention I am unable to accept. As stated above the application was against the very firm against whom the decree was passed, and I have no doubt that it was intended to include all the persons who were mentioned in the decree as the members of the firm. It is further clear that the order of 1st October did not decide any matter which could operate as *res judicata*. Upon these facts I am of opinion that the application of 19th April 1917 should be viewed not as an application to initiate a new execution, but as an application for the revival of the previous proceedings which were interrupted by the order of 1st October. There is a mass of authority for treating such an application as one for the revival of the previous application, *vide, inter alia, Qamar-ud-din Ahmad v. Jawahir Lal* (1) and *Ghulam Jilani v. Yusaf Shah* (2).

But even if we regard the application of 1917 as a new application, I consider that under S. 15, Lim Act of 1908, the period during which the execution had been stayed by the order of the Court should be excluded. The terms of the aforesaid section as contained in the Limitation Act of 1908 are perfectly clear and the decree-holders are entitled to exclude the period from 1st October 1912 to 3rd April 1916 when it was decided that Jugal Kishore was not an insolvent and that there was nothing in the insolvency proceedings to prevent the decree-holders from taking steps for the recovery of the money from him. The judgment in *Ram Das v. Kanshi Ram* (3) cited by Mr. Tek Chand is not in point, because a perusal of the report shows that no order staying execution was passed in that case.

On both the grounds set out above the proceedings in execution are within time and I accordingly accept the appeal and setting aside the order of the lower Court return the case with the direction that proceedings for execution be taken against Jugal Kishore in accordance with law. The respondent must pay the costs of the appellant in this Court.

R.M./R.K. *Appeal accepted.*

(1) [1905] 27 All. 334=32 I. A. 102 (P. C.).

(2) [1894] 106 P. R. 1894.

(3) [1912] 14 I. C. 335.

## A. I. R. 1919 Lahore 172

BEVAN-PETMAN, J.

*Kallan*—Defendant—Appellant.

v.

*Mohammad Mir and others*—Plaintiffs and Defendants—Respondents

Second Appeal 566 of 1919, Decided on 12th November 1919, from decree of District Judge, Delhi, D/- 22nd December 1918.

Civil P. C. (1908), S. 11, Expl. 6 —Representation suit—Subsequent suit by parties interested—Matter directly and substantially in issue in previous suit—Decision acts as *res judicata*.

Plaintiff sued on behalf of himself and the Mahomedan community for a declaration to the effect that the land sold by defendant 1 to defendant 2 was wakf and that the sale-deed was null and void. It appeared that in 1888 plaintiff on behalf of himself and the Mahomedan community had brought a similar suit against defendant 1 and one I.

*Held*: (1) that Expl. 6, S. 11, Civil P. C., was applicable to the case and it could not be contended that the parties to the two suits were not the same; (2) that the question whether the area in dispute was wakf or not was directly and substantially in issue in the earlier suits, and having been adjudicated upon could not be re-opened: 157 P. R. 1889 (F. B.) Dist.

[P 173 C 2; F 174 C 1]

*W. B. O'Connor, Cooper and Badur-ud-Din Kureshi*—for Appellant.

*Moti Sagar and Mohammad Iqbal*—for Respondents.

**Judgment.**—This judgment will cover Appeals Nos. 566, 627 and 628 of 1919. Appeal Nos. 566 and 627 arise out of a suit, No. 74 of 1917, and are separate appeals by two defendants. Suit No. 74 of 1917 was by S. Mohammad Mir and others on behalf of the Mahomedan community against Muzaffar Ali Khan and Kallan, the present appellants, for a declaration that two sales by Muzaffar Ali Khan to Kallan were void on the ground that the land sold was part of a graveyard and was wakf. The suit originally related to three sales and was valued at Rs. 1,200 but, apparently, to enable the plaintiffs to avail themselves of the plea of *res judicata* one sale was abandoned and the plaint was amended and limited to two sales, whereby the value of the suit was reduced to Rs. 750. Appeal No. 628 arises out of Suit No. 129 of 1917 which was instituted by S. Mohammad Mir on behalf of himself and the Mahomedan community against Muzaffar Ali Khan alone. This suit was for an injunction restraining the defendant from doing any



acts against the interests of the Mahomedans in the graveyard either by alienating the lands, building thereon or otherwise.

In Suit No. 74 the case for the plaintiffs was that the land sold by Muzaffar Ali Khan was part of a larger area of 43,620 square yards which was wakf and which consisted of a dargah, or shrine, and land attached to it which was a graveyard. The defence was that the whole of this area was not wakf property, that some 2,000 square yards of land was wakf property and that the remainder was the private property of Muzaffar Ali Khan, of which he had already sold part, and that the portion sold to Kallan was his private property. On 30th May 1917 in the course of the proceedings Muzaffar Ali Khan made an important statement, in which he admitted that the area in dispute was 43,620 square yards. He also alleged that originally he had been owner of the whole land but that part of it had become a graveyard and urged that no one could be buried in the land without his permission and without payment or purchase. He also admitted that the whole of the land which was in dispute was shown in the revenue papers in 1866 as Government land. The first Court decided both suits in favour of the plaintiffs, on the ground that the matter was *res judicata* by virtue of a suit, No. 46 of 1888. The defendants appealed in both the cases, which appeals were dismissed by the lower appellate Court, that Court agreeing with the decision of the first Court. The defendants therefore now appeal to this Court.

The only point for decision is whether the two suits are barred by *res judicata* as found by the lower Courts. For this purpose it is necessary to compare Suit No. 46 of 1888 with the present suits. In the 1888 suit the parties were S. Mohammad Mir on behalf of himself and the Mahomedan community against Ibrahim Ali and Muzaffar Ali Khan, whilst in Suit No. 74 of 1917 the parties are S. Mohammad Mir and three others on behalf of the Mahomedan community, plaintiffs, and Muzaffar Ali Khan and Kallan, defendants. In Suit No. 129 of 1917 S. Mohammad Mir on behalf of himself and the Mahomedan community is the plaintiff and Muzaffar Ali Khan the defendant. Mr. Muharram Ali Chishti,

on behalf of Muzaffar Ali Khan, urges that inasmuch as the parties are not the same, S. 11, Civil P. C., is not applicable but this contention is untenable. Kallan is a purchaser from Muzaffar Ali Khan and Expl. 6, S. 11, Civil P. C., also makes the point clear. I therefore overrule this contention.

The facts in the 1888 suit were that the defendant Ibrahim Ali had purchased a part of the graveyard from Muzaffar Ali Khan and had buried his wife there and had also enclosed with a wall certain existing graves and that the construction of that wall had injured other graves, including that of the father of the plaintiff. The case for the plaintiff was that the dargah, with the land attached to it, on which there were a large number of graves and which, including the shrines, measured 11 bighas 1 biswas was wakf property and that Muzaffar Ali Khan had no right to sell any portion of it and that Ibrahim Ali had no right to do the acts complained of. The defendant Muzaffar Ali Khan pleaded that he was the muttawali of the dargah, that the land connected with the dargah and used as a cemetery was not wakf, that the land had been gifted by the Emperor Jahangir to his ancestors and that from the time of the gift it had remained the property, and in possession, of his family, that he had the right to alienate the property for the purposes and safety of the tombs only and not for any dwelling purposes and that in accordance with the usage prevalent in other cemeteries in Delhi land measuring 2½ yards by 1½ yard was sold by him at the rate of Rs. 40 to persons desiring to bury their dead. The first issue in the suit was

"whether the land of the cemetery of the dargah where lies the disputed place is wakf or private property."

The Court decided issue 1 in favour of the plaintiff and held that the dargah including cemetery, etc., i. e. the whole area of 11 bighas 11 biswas was wakf property. Issue 1 in Suit No. 74 of 1917 is:

"Is the land in dispute (i. e. the whole 43,620 yards) a qabristan and was expressly made wakf for the purpose?"

Issue 2 is:

"Is the land wholly or partially waqf by reason of its being used as qabristan for the public, and if partially, how much?"

The suits, Nos. 74 and 129, were practically consolidated and these were the



issues in both of those suits. It is urged by both Mr. O'Connor for Kallan and Mr. Moharram Ali Chishti for Muzaffar Ali Khan that the areas in dispute in the 1888 suit and in the present suit are not shown to be identical and whereas the actual area of 1888 was a plot of 21 feet by 22 feet, in Suit No. 74 of 1917 the two plots make a total of 300 square yards. Now the suit in 1888 related to khasra No. 399, measuring 11 bighas 11 biswas, and a gosha of 14 biswas, making a total of 12 bighas 3 biswas: and the settlement papers, which were then produced, show that it is one large plot including a dargah or shrine and a masjid.

In his application in the present suits the plaintiff asks for a map to be prepared of khasra No. 399 by the kanungo. Both parties had maps prepared of the total area in dispute and Muzaffar Ali Khan admitted in the Court that the plan of the plaintiff agreed with his plan in general form and outlines. Muzaffar Ali Khan also admitted as I have already pointed out, that the area in dispute had been entered in the revenue papers in 1866 as Government property. This is khasra No. 399. There is in my opinion no doubt whatever that the issue in the 1888 case and in the present cases with regard to the total area claimed by the plaintiff as wakf is the same and that the specific plots now sold were included in issue 1 in the 1888 case. We have now to see whether the decisions of the issues with regard to the total area being wakf or not was directly and substantially in issue in all these suits or whether the matter arose only incidentally. In my opinion the matter whether this total area was wakf or not is directly and substantially in issue in the present cases and was directly and substantially in issue in the 1888 case. It was necessary to decide this point before the rights of the parties with regard to the small areas actually in suit could be ascertained and settled. Mr. Muharram Ali Chishti has referred me to a number of rulings some of which have been dealt with in *Babu Lal v. Hari Bakhsh* (1) and some are not in point. It is unnecessary to deal with each and all of them. *Narain Das v. Faiz Shah* (2) relied on by him is clearly against him. It is doubtful whe-

ther the appellants can take the objection that the property in the present suits is different. This was not specifically urged in the lower Courts in the sense that the total areas dealt with were not the same. The other requirements of S. 11, Civil P. C., have been complied with. The Court which tried the 1888 suit was competent to try the subsequent suit and the decision on issue 1 in the 1888 suit was upheld on appeal. In his reply Mr. Muharram Ali Chishti has endeavoured to raise a new point for the first time to the effect that the injunction in so far as it restrains building cannot be res judicata, but this matter cannot be gone into at this stage. For the above reasons I dismiss all three appeals with costs.

R.M./R.K.

*Appeal dismissed.*

### A. I. R. 1919 Lahore 174

RATTIGAN, C. J. AND MARTINEAU, J.

*Sain Das and others* — Defendants — Appellants.

v.

*Bishambhar Das and another* — Plaintiffs and Defendants — Respondents.

First Appeal No. 1117 of 1915, Decided on 1st February 1919, from decree, First Class Sub-Judge, Amritsar, D/- 22nd February 1915.

Civil P. C. (1908), S. 11—Mortgagee suing for declaration that property is not liable to be sold free of his encumbrance—Defendants contending that one defendant alone was exclusive owner under will proved in another suit—Plaintiff not being party to that suit that decision could not be res judicata.

Plaintiffs sued for a declaration that certain property was not liable to attachment and sale in execution of a decree without preservation of their mortgagee rights. It was contended by the decree-holders that defendant 6 being the sole owner of the property under a will, the other members of the family had no power to mortgage it and that the execution of the will had been held to be proved in an earlier suit by defendant 6 against his father and uncle :

*Held* : (1) that the present plaintiffs not being parties to the earlier case, the finding as to the execution of the will could not operate as res judicata ; (2) that the execution of the will not having been proved, the plaintiffs were entitled to a decree. [P 176 C 1]

*Nanak Chand*—for Appellant.

*Moti Sagar and Tek Chand*—for Respondents.

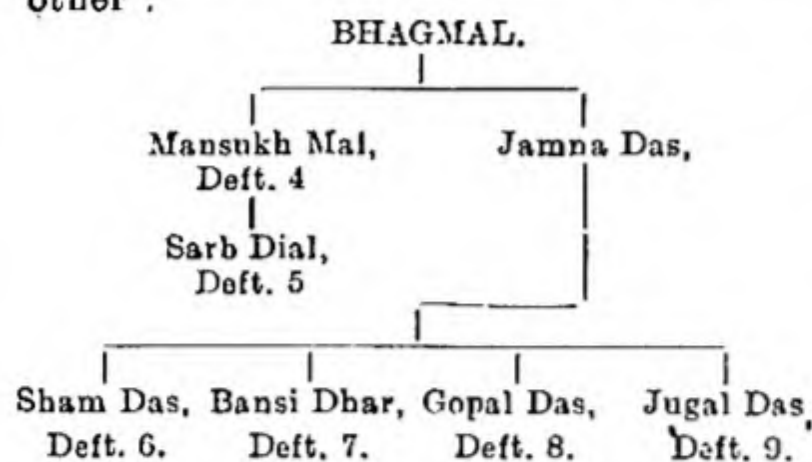
**Judgment.**—This appeal and appeal No. 1118 arise out of two suits, the plaintiffs in which are mortgagees of certain property under two deeds executed

(1) [1918] 13 P. R. 1918=41 I. C. 479.

(2) [1889] 157 P. R. 1889 (F. B.)



in 1910 by defendants 4, 5 and 7 and by Jamna Das on his own behalf and as guardian of his sons, defendants 8 and 9. The following pedigree-table shows how defendants 4 to 9 are related to one another :



Two shops, which form part of the mortgaged property, were attached by defendants 1 to 3 in execution of a decree obtained against Jamna Das defendants 4 to 7. The mortgagees objected unsuccessfully, and they then filed the present suits for a declaration that the property was not liable to attachment and sale except subject to their rights under their mortgages.

The defence is that Sham Das defendant 6 is the sole owner of the shops under a will of his grandfather Bhag Mal dated 21st November 1902, and that therefore the other members of the family had no power to mortgage the shops.

The lower Court has passed decrees in the plaintiffs' favour, finding that the execution of the will is not proved, and that Sham Das is estopped by his conduct from setting up his exclusive title to the shops.

The important question is whether the will is genuine. It is noteworthy that Bhag Mal, though he lived till 1904, did not have the will registered, and that after his death no mention appears to have been made of its existence till May 1912, when Sham Das alleged it in a suit brought by him against his father and uncle.

The evidence as to the execution of the will consists of the statements of Nikka Mal, who wrote it, and Kirpa Ram, Lok Nath and Narinjan Das, who attested it.

The learned District Judge points out that Nikka Mal, if he has given his age correctly, could have been only 13 years old in 1902. Apparently however Nikka Mal understated his age as the registers

which he keeps as a deed-writer date from 1898. But putting aside the matter of his age there is another strong reason for rejecting his evidence, namely, his inability to produce the register in which he says he made an entry of the will. He first said he had got the register at his house, and even gave the number of the entry in it about the will, but further on changed his statement and said the register had been lost at the time of the earthquake when his house fell. It is significant that in a case in 1914, in which the genuineness of a receipt he had written was in dispute, a similar allegation was made as to his having lost the register (of the year 1909) in which he said he had made an entry of the document. A perusal of his evidence shows him to be an unreliable witness.

Kirpa Ram is, as the lower Court remarks, a man of no position. He says that the document had already been written out when Bhag Mal asked him to sign it, that Bhag Mal did not execute it in his presence, and that he did not hear it read out. He cannot even say whether it was two years ago or more or less that he signed the will.

Lok Nath also admits that the will was not written, and that Bhag Mal did not sign it in his presence, and that it was not read out to him.

Narinjan Das (who is a connexion of Sham Das by marriage) was living at Manewal at the time when the will is said to have been executed. He says that he came to Amritsar about a case, and that while he was there he went to Bhag Mal's house, where he witnessed the will. He began by saying that it was Jamna Das who had got the will drawn up and asked him to attest it, and that he had gone to the house to inquire after Jamna Das, who was ill. But on the will being shown to him he said that he had mentioned Jamna Das, name by mistake for Bhag Mal, and that it was Bhag Mal who was ill, and whom he had gone to see. He is contradicted by Kirpa Ram and Lok Nath, who say that Bhag Mal was not ill. He also contradicts those witnesses by saying that Bhag Mal signed the will in their presence.

The whole of the evidence in regard to the will is most unsatisfactory, and we agree with the finding of the learned District Judge that the execution of the will has not been proved.



Mr. Nanak Chand has referred to the judgment of 1912 in the suit, referred to above, which Sham Das brought against his father and uncle, and has contended that the finding in that case that the execution of the will had been proved operates as *res judicata*. This contention is clearly wrong as the plaintiffs were not parties to that case, and they obtained their mortgages from Jamna Das and Mansukh Mal and their sons long before Sham Das brought his suit.

The will not having been proved, the appeal fails and we dismiss it with costs.

R.M./R.K.

*Appeal dismissed.*

### A. I. R. 1919 Lahore 176 (1)

SHAH DIN, J.

*Hukam Chand* — Auction-purchaser-Petitioner.

v.

*Ganga Ram and others*—Opposite Parties.

Civil Revn. No. 193 of 1918, Decided on 28th May 1918, from order of Sub-Judge, Lahore, D/- 30th November 1917.

(a) Civil P. C. (1908), S. 47—Execution of money decree—Auction-purchaser not party to suit is not representative of judgment-debtor.

An auction-purchaser in execution of a simple money decree who was not a party to the suit is not a representative of the judgment-debtor within the meaning of S. 47, Civil P. C.

[P 176 C 2]

(b) Civil P. C. (1908), S. 47—Auction sale of moveable property duly confirmed by executing Court—There is no provision to set aside sale upon application by decree-holder or judgment-debtor.

There is no provision of the Civil Procedure Code "under which an auction sale of moveable" property which has been duly "confirmed" by the executing Court can be set aside upon the application of the decree-holder or the judgment-debtor.

[P 176 C 2]

*Bakhshi Ram*—for Petitioner.

*Moti Lal*—for Opposite Parties.

**Judgment.**—The facts are given in the judgment of the learned Senior Subordinate Judge of Lahore. He has held that an appeal by the decree-holder lay to him from the order of the Munsif, dated 21st June 1917, under S. 47, Civil P. C., not merely against the judgment-debtor but also against the auction-purchaser, although the latter was not a party to the suit. In support of this view the Subordinate Judge has cited the decision of their Lordships of the Privy Council in *Prosunno Kumar Sanyal v. Kali Das Sanyal* (1). I have read that

(1) [1892] 19 Cal. 633=19 I. A. 166 (P.C.).

decision, especially the penultimate paragraph at p. 689 relied upon by the pleader for the respondents. In my opinion that decision is not in point, inasmuch as it does not lay down that the auction-purchaser who is not a party to the suit is a "representative" of the judgment-debtor within the meaning of S. 244 of the old Civil P. C. The decision more in point is one of the Chief Court of Burma reported as *Mahomed Hassim v. Ma Sein Bwin* (2). There it was held that an auction-purchaser at a sale in execution of a simple money decree is not a "representative" within the meaning of S. 244 (c). He is not bound by, nor affected by, the decree. There is also no privity between him and the judgment-debtor and he may be a purchaser against the wish of the judgment-debtor. This last observation applies to the present case, in which both the decree-holder and the judgment-debtor have made common cause and want the auction-sale to be set aside. In my opinion the order of the Munsif, so far as it was in favour of the auction-purchaser, was not appealable to the Senior Subordinate Judge under S. 47, Civil P. C., and I set aside his order on appeal.

The pleader for the respondents was also constrained to admit that there is no provision of the Civil Procedure Code "under which an auction sale of moveable" property which has been duly "confirmed" by the executing Court can be set aside upon the application of the decree-holder or the judgment-debtor. Admittedly, the auction sale of the decree in question in the present case was duly confirmed and the decree-holder had no right to have it set aside. I accept this revision, set aside the order of the Senior Subordinate Judge and restore that of the Munsif with costs throughout.

R.M./R.K.

*Petition accepted.*

(2) [1909] 5 L. B. R. 85=3 I. C. 713.

### A. I. R. 1919 Lahore 176 (2)

BROADWAY, J.

*Bhag Mal and another*—Appellants.

v.

*Hari Singh and others*—Respondents.

Second Appeal No. 2734 of 1918, Decided on 12th February 1919, from decree of Dist. Judge, Karnal D/- 18th June 1918.



(a) **Cosharers**—Transfer by one cosharer of right of occupation in village common land—Others cannot object.

It is not open to a cosharer in a village to object to a transfer by another cosharer of his right of occupation in the village common land. [P 177 C 1]

(b) **Punjab Courts Act (1918), S. 41 (3)**—Appellant challenging right on basis of custom—Certificate is necessary.

An appellant cannot in second appeal challenge a right on the basis of some custom without a certificate. [P 177 C 1]

*Lakshmi Narain*—for Appellants.

*Shamair Chand*—for Respondents.

**Judgment.**—The plaintiffs-appellants sought to get a sale of a site in the abadi of the village set aside on the ground that the vendor had no power to sell it and that the vendees, by building on it deprived the plaintiffs-appellants of their rights of user. It has been found that the vendor had been occupying the said site for many years and had erected a Gatwar thereon 40 years ago, which he has now sold. The vendor and vendees are both proprietors in the villages. The site is admittedly a part of the common land belonging to Pana Rajan and the vendees admit that in the event of the village sites being partitioned this land would have to be brought into hotch-pot. All that the vendor has done is to transfer his right of occupation and I cannot see that the plaintiffs-appellants have any right to object [*Bhagwan Das v. Futteh Singh* (1) and *Ram v. Pir Bakhsh* (2)]. Mr. Shamair Chand, for the respondents, contended that the right to sell could only be challenged on the basis of some custom and that the absence of a certificate bars an appeal. There is force in this as well. I dismiss the appeal with costs.

R.M./R.K. *Appeal dismissed.*

(1) [1884] 42 P. R. 1884.

(2) [1901] 83 P. R. 1901.

## A. I. R. 1919 Lahore 177

BROADWAY, J.

*Ramji Lal*—Plaintiff—Petitioner.

v.

*Manya and others*—Defendant—Opposite Parties.

Civil Revn. Petn. No. 925 of 1918, Decided on 3rd March 1919, from decree of Sr. Sub-Judge, Gurgaon, D/- 27th June 1918.

Civil P. C. (1908), S. 115—Taking erroneous view of law or omitting to decide question of fact is material irregularity.

Where a Court takes an erroneous view of the

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law, or omits to decide a question of fact, e.g., whether or not a balance was struck, it commits a material irregularity, and its decision is open to revision by the High Court. [P178 C 1]

*Shamair Chand*—for Petitioner.

*Sundar Das*—for Opposite Parties.

**Judgment.**—The plaintiff in this case instituted a suit against the defendants claiming to recover from them Rs. 400 being principal and interest due on a bahi account. The account is a very ancient one and had been commenced in Sambat 1919, the defendants having dealings with Bansi Dhar, father of the plaintiff. This Bansi Dhar died in Sambat 1956 (1899 A. D.) and at that time the plaintiff is said to have been aged two and a half years. His mother, who acted as his guardian, appointed one Laiq Ram as manager of the business and it is said that in Sambat 1957 (1900 A. D.) the defendants struck a balance acknowledging the correctness of the account in the books. The suit was brought on 1st October 1917 and was decreed by the trial Court. The learned Senior Subordinate Judge however dismissed the suit on appeal on the ground that the claim was barred by limitation. In coming to this decision the learned Subordinate Judge directed his mind solely to the correctness or otherwise of an allegation to the effect that between Sambat 1956-1957 the defendants had taken a buffalo valued at Rs. 35 from the plaintiff's shop. He held that this particular transaction had not been proved and came to the conclusion that it had only been brought forward with a view to bringing the suit within time. The question as to whether any balance had been struck by the defendants in 1957 was completely lost sight of, and before me it has been contended by Mr. Shamair Chand on behalf of the plaintiff-petitioner that if this balance be found to have been struck, then the suit must be regarded as within time.

My attention was drawn to Ss. 19 and 6, Lim. Act, 1908; and it is urged that the striking of a balance or an acknowledgment within the purview of S. 19 of the Act results in the commencement of a fresh period of limitation to be computed from the time when the acknowledgment was signed, and that inasmuch as in Sambat 1957 the plaintiff was a minor, S. 6 of the act was applicable and the time from which



the period of limitation was to be computed was postponed to the date when the plaintiff became a major. It was therefore contended that the suit was within time, and my attention was drawn to *Venkataramayyar v. Kothindaramayyar* (1), *Sarat Chandra Singh v. Sudhan Hari Mukerjee* (2) and Halsbury's Laws of England, Vol. 19, p. 6. Mr. Sunder Das on behalf of the defendants-respondents admitted the contention, but urged that there was really no proof of the striking of any balance by the defendants, and further that there was no proof that the debt was really due. It seems to me however that it is not for me sitting as a Court of revision to go into the merits of the case. The learned Subordinate Judge has taken an erroneous view of the law and has acted with material irregularity in totally ignoring the alleged acknowledgment of Sambat 1957. I therefore accept this petition and return the case to the Court of the Senior Subordinate Judge, who will hear the parties with regard to the striking of the balance and come to a decision whether or not as a matter of fact the balance was struck and whether the striking of such balance is sufficient to prove the case for the plaintiff. Costs will follow the event.

R.M./R.K.

*Petition accepted.*

(1) [1890] 30 Mad. 135.

(2) [1912] 14 I. C. 694.

**A. I. R. 1919 Lahore 178**

SCOTT-SMITH, J.

*Shanti Parshad and another*—Appellants.

v.

*Mt. Dhan Devi and another*—Respondents.

Misc. First Appeal No. 1296 of 1918, Decided on 5th February 1919, from order of Dist. Judge, Ludhiana, D/- 27th February 1918.

(a) **Hindu Law—Adoption—Second adoption during lifetime of first adopted son is invalid.**

Under Hindu law the adoption of a second son during the lifetime of the first adopted son is invalid. [P 179 C 1]

(b) **Hindu Law—Adoption—Agreement—Ante-adoption agreement between parents reserving life interest to widow is valid and enforceable.**

An agreement between the adoptive father or mother and the natural father or mother of the adopted boy by which the latter's rights are to take effect after the adoptive mother's death is perfectly valid. [P 179 C 2]

Where therefore a deed of adoption reserved to the wife of the adoptive father a right to his property during her lifetime:

*Held:* that the condition was binding on the adopted son. [P 179 C 2]

*Tek Chand and Mehr Chand Mahajan*—for Appellants.

*Gokul Chand Narang and Mahesh Das*—for Respondents.

**Judgment.**—This order will dispose of the four connected Civil Appeals Nos. 1296, 1297, 1300 and 1301 of 1918. The facts are fully given in the order of the learned District Judge and are briefly as follows: Tilok Chand, husband of Mt. Dhan Devi, respondent in all the appeals, died on 22nd August 1916. On 14th of July 1917 Mt. Dhan Devi applied for the grant of a certificate in regard to his debts under Act 7 of 1889. On the same day Hira Lal, appellant in Civil Appeals Nos. 1300 and 1301, through his next friend Lajpat Rai, applied for grant of Letters of Administration to the estate of Tilok Chand under S. 64, Act 5 of 1881, on the ground that he had been adopted by the deceased on 15th August 1916. Whilst the enquiry into these two applications was pending, a third application was made by Shanti Parshad, through Mehr Chand, his uncle, appellant in Civil Appeals Nos. 1296 and 1297 of 1918, for grant of Letters of Administration to the same estate on the ground that he had been adopted by the deceased on 25th June 1915. Lajpat Rai, who is father both of Hira Lal and Shanti Parshad, eventually admitted the adoption of Shanti Parshad by Tilok Chand, but said that the latter had cancelled the adoption. Mt. Dhan Devi also admitted the adoption of Shanti Parshad but claimed that his rights were postponed during her lifetime. Evidence was recorded in the application of Hira Lal and subsequently a statement was made on Shanti Parshad's behalf that he accepted that evidence. The learned District Judge held that Shanti Parshad was duly adopted on 25th June 1915 subject however to the condition that Mt. Dhan Devi should enjoy Tilok Chand's property during her lifetime. He further held that Hira Lal's adoption was only a paper one and had no effect in view of the previous adoption of Shanti Parshad which Tilok Chand had no power to cancel, and did not in fact cancel. He therefore granted Mt. Dhan Devi's application for a certificate and dismissed the applications of Shanti Parshad



and Hira Lal for grant of Letters of Administration.

Hira Lal and Shanti Parshad have filed two appeals each, one against the order granting Mt. Dhan Devi a certificate and the other against the order dismissing the applications for grant of Letters of Administration. In the first place it is quite clear that Shanti Parshad was adopted by Tilok Chand. I have read the evidence which proves this fact beyond all doubt. Not only was Shanti Parshad adopted but Tilok Chand subsequently sent him to school and paid his school fees and thus treated him as his son. Moreover, the factum of adoption has been admitted both by Lajpat Rai and by Mt. Dhan Devi. This being so Hira Lal has no locus standi whatsoever, for under Hindu law the adoption of a second son during the lifetime of the first adopted son is invalid [see *Tek Chand v. Mt. Gopal Devi* (1)]. It remains to consider whether Shanti Parshad's rights are postponed during the lifetime of Mt. Dhan Devi. Now it is clearly proved by the evidence of the scribe and other witnesses that a deed of adoption was executed. This deed has not been produced but the scribe produced a copy of the entry in his register which gives the contents of the deed. Bakhshi Tek Chand on behalf of Shanti Parshad objects to the production of this secondary evidence. Firstly, he says that Mt. Dhan Devi probably has the original deed which she is withholding. Now it is clear that Lajpat Rai gave Shanti Parshad to be adopted by Tilok Chand and the probability is that any deed that was written by him was kept by him on behalf of his son. He produced the second deed of adoption in favour of Hira Lal, and I think there can be no doubt that he had the first deed also and that he is withholding it. In my opinion therefore Mt. Dhan Devi was quite entitled to produce secondary evidence of the deed. The second objection taken in regard to this deed is that as it is an instrument which reserves a life estate to the wife of the adopter in immovable property, it required registration. *Pirsab Kasimsab Itagi v. Gurappa Basappa Kadigi* (2) is the authority quoted in support of this proposition. The question is a somewhat difficult one but I do

not think it is necessary to decide it in the present case. No objection appears to have been taken in the lower Court to the production of the copy of the entry in the petition writer's register, and when Shanti Parshad's case was taken up, the statement was made on his behalf that he accepted the evidence already given in the case of Hira Lal. This statement was made without any reservation as to the document in question and therefore I do not think it is open to his counsel to raise the objection in the Court of appeal.

Now this document clearly shows that a right to the property of the adoptive father was reserved to Mt. Dhan Devi during her lifetime. Bakhshi Tek Chand however argues that such a condition is invalid according to Hindu Law. Mr. Rama Krishna in his Hindu Law, Ch. 7, has examined various authorities dealing with this matter, and points out at p. 199, Vol. 1 that all High Courts presumably seem to uphold the agreement between the adoptive father or mother and the natural father or mother of the adopted boy by which the latter's rights are to take effect after the adoptive mother's death. It is unnecessary in the present case to refer to the authorities in detail, for this seems to be clearly the law as at present interpreted. Bakhshi Tek Chand however urges that there is no evidence that Lajpat Rai agreed to this condition. There is certainly no direct evidence to the effect that he did agree, but the deed was written at the time of the adoption and Lajpat Rai was present and gave the boy to be adopted by Tilok Chand. Under these circumstances there can be no doubt that he was perfectly aware of the condition in question and agreed to it impliedly, if not explicitly. I therefore hold that the condition is binding upon Shanti Parshad. I agree with counsel for Mt. Dhan Devi that the whole of this litigation is due to Lajpat Rai who wants to get possession at once of the whole of Tilok Chand's property. I have no doubt that the second adoption, i. e., that of Hira Lal, was engineered by him because he wanted to avoid the condition attached to the earlier adoption of Shanti Parshad, which he knew would prevent him getting possession of the property.

It is finally contended by Bakhshi Tek Chand that a certificate should not have been granted to Mt. Dhan Devi without

(1) [1912] 46 P. R. 1912=13 I. C. 482.

(2) A. I. R. 1914 Bom. 47=88 Bom. 277=24 I. C. 716.



security being taken from her. I have already passed an order refusing to recall the certificate until security be given and there is no need to consider the question again. I dismiss all four appeals and I direct that Lajpat Rai shall pay Mt. Dhan Devi's costs in Civil Appeals Nos. 1300 and 1301 and Mehr Chand shall pay them in Civil Appeals Nos. 1296 and 1297 of 1918. Each of them will pay half her counsel's fees.

R.M./R.K. *Appeals dismissed.*

### A. I. R. 1919 Lahore 180

CHEVIS AND SCOTT-SMITH, JJ.

*J. Rustomji of Lahore—Appellant.*

v.

*Official Liquidator of the People's and Amritsar Banks, Ltd. and another—Respondents.*

Misc. First Appeal No. 1 of 1919, Decided on 17th January 1919, from order of Broadway, J., D/- 10th December 1918.

(a) Appeal—Right person not party to suit cannot appeal.

An appeal is a stage in and part of the proceedings in a suit and therefore no person can appeal unless he is a party to the suit.

[P 181 C 1]

(b) Companies Act (1882), Ss. 169 and 254—Rules framed under S. 254, R. 58—Appeal under S. 169 against order sanctioning compromise—R. 58 framed under S. 254 not complied with—Name not entered in book and proceedings not attended—Appellant held to have no right to appeal—Application could not be treated as petition for revision.

In an appeal filed under S. 169, against an order sanctioning a compromise between the liquidator of a certain Bank and a debtor of the Bank, it appeared that the appellant had not complied with R. 58 of the rules framed by the Chief Court under S. 254 of the Act and had not entered his name in the book kept for the purpose and had not in fact attended the proceedings:

*Held:* (1) that the appellant, not having qualified himself to attend the proceedings and not having been a party to the proceedings before the trial Judge, had no locus standi to appeal; (2) that under the circumstances it was not proper to treat the application as a petition for revision.

[P 181 C 1]

*Santanam—for Appellant.*

*Petman and Ralli, for Official Liquidator, Beechey and Raghu Nath Sahai, for Harkishen Lal—for Respondents.*

**Judgment.**—This is an appeal under S. 169, Companies Act 6 of 1882, from an order of a Judge of this Court sanctioning a compromise between the liquidator of the People's Bank and the Amritsar Bank and Lala Harkishen Lal.

Mr. Petman on behalf of the liquidator raises two preliminary objections: (1) that the appellant, Mr. Rustomji, not having been a party to the proceedings before the trial Judge, has no locus standi to appeal; and (2) that the appeal is barred by time notice of the appeal not having been given to the respondent within three weeks after the order complained of was made. The first objection is based upon R. 58 of the rules framed by this Court under the powers conferred by S. 254, Companies Act, 1882, which is as follows:

"No contributory or creditor shall be entitled to attend any proceedings before the Judge, unless and until he has entered in a book to be kept there for that purpose his name and address, and the name and address of his attorney, pleader or agent (if any), etc."

It is contended that Mr. Rustomji not having entered his name in the book in question was not entitled to attend the proceedings before the trial Judge and did not in fact so attend, and not having been a party to the proceedings he cannot appeal. Mr. Petman refers to the English case, *Securities Insurance Company, In re* (1). In that case a Judge having made an order sanctioning an arrangement under the Joint Stock Companies Arrangement Act, 1870, an appeal was presented by persons whose interests as creditors were affected by the scheme, but who had not opposed the scheme at the meeting of creditors, nor appeared before the Judge when his sanction was applied for, nor obtained leave to appeal, it was held that the right of appeal under the Act is governed by the Companies Act, 1862, S. 124, which gives a right of appeal subject to the same conditions as appeals from decisions in the ordinary jurisdiction of the Court; and that, according to the practice of the Court of Chancery a person not a party to the proceedings could not appeal from an order without the leave of the Court, the appeal must be dismissed, the appellants not having obtained leave, and the case not being one in which the Court thought that leave ought to be given. It is urged that this is on all fours with the present case. The argument appears to us to be correct. Mr. Santanam on behalf of the appellant has told us what his client's reasons were for not getting his name entered in the register in accordance with R. 58. He says that in

(1) [1894] 2 Ch. 410.



previous proceedings relating to the liquidator's commission Lala Faqir Chand, himself a contributory, was appointed to represent the contributories under R. 57, and that his client thought that in other proceedings some one would be similarly appointed to represent the contributories, but as a matter of fact no one was appointed to represent them in the present proceedings. We do not see that we have anything to do with the reasons which moved Mr. Rustomji not to get his name entered in accordance with R. 58. The fact remains that he did not get his name entered and never took any interest in the proceedings up to the present. It is therefore clear that he was not entitled to attend the proceedings before the trial Judge and he did not in fact attend them. Mr. Santanam urges that S. 96, Civil P. C., does not lay down who may appeal. An appeal however is a stage in and part of the proceedings in a suit; and it therefore appears obvious to us that no person can appeal unless he is a party to the suit.

Next Mr. Santanam asks that we should hold that in any case Mr. Rustomji can appeal with the leave of this Court and that we should give him leave to appeal. Now assuming for the sake of argument that we can give him leave to appeal, we do not think that we should give him leave, for the reason that he has never hitherto taken any interest in the proceedings and has not taken the trouble to comply with R. 58. There is also an application that Mr. Rustomji should be appointed a representative of all the contributories under the provisions of R. 57. This application we have no hesitation in rejecting, for we consider that a contributory who has not taken the trouble to qualify himself to attend the proceedings in accordance with R. 58, is certainly not a suitable person to be appointed as a representative of the other contributories.

Finally, it is urged by Mr. Santanam that if we decide that his client has no locus standi to appeal, we should consider this as a revision. This we decline to do. The order of the trial Judge was appealable, but the appellant not having qualified himself to attend the proceedings has no locus standi to appeal. Under such circumstances we think it would be most improper to allow him to present a petition for revision to this

Court. The appeal fails and is dismissed with costs.

R.M./R.K.

*Appeal dismissed.*

### A. I. R. 1919 Lahore 181

SCOTT SMITH, J.

*Nabi Bakhsh and others—Defendants*  
—Appellants.

v.

*Jangi and another—Plaintiffs—Respondents.*

Second Appeal No. 1705 of 1918, Decided on 3rd February 1919, from decree of Dist. Judge, Delhi, D/- 24th February 1918.

**Mahomedan law—Wakf—Creation—Land used as grave yard—It becomes wakf by user without dedication—Fact that it was inherited from father to son does not affect.**

Land which has been turned into a graveyard can become wakf by user even if there be no express dedication.

Where it appeared that practically the whole of the land in suit was covered by graves.

**Held:** that it had become wakf by user and the fact that it had been inherited from father to son was not sufficient reason for considering it as alienable. (P 182 O 1)

*Moti Sagar—*for Appellants.

*Manohar Lal—*for Respondents.

**Judgment.**—In the suit out of which the present appeal arises the plaintiffs sued for the cancellation of a sale of certain land on the ground that it constituted a graveyard and was wakf property and therefore inalienable. The Courts below have concurred in holding that the land is wakf and have decreed the plaintiffs' claim. The defendants, who are the vendors and vendee of the land, have filed a joint appeal to this Court and Rai Sabib Moti Sagar has argued the appeal on their behalf.

Various points are raised in the grounds of appeal, but the only one argued before me was as to whether the land was wakf or not. Counsel for the appellants contends that there is absolutely no evidence of dedication of the land. He has referred to the entries regarding the land one-third of which was sold, which show that in 1842 it was entered in the name of Kallu, grave-digger. In 1857 at the time of the rebellion the muafi was confiscated, but in 1858 the land was released to the three sons of Kallu and in the 1880 Settlement it was shown as owned by three different sets of persons in equal shares. The recorded owners of one-third share have now sold it to Muhammad Ihsan, defendant 4. Counsel argues



that the fact, that the land is shown as private property and has devolved according to the usual rules of inheritance, shows that it is not wakf. He also points out that evidence has been produced to show that when any body is buried in the land, a charge of Rs. 5 or more is made and that the income from these fees goes to the recorded proprietors. He has referred to Art. 95, Rattigan's Digest of Customary Law, which is as follows:

"To constitute property wakf there must be a special and absolute appropriation of the property to religious or public purposes."

He has also referred to *Khawja Mahmud v. Khawja Muhammad Hamid* (1), in which at p. 128 (of P. R. 1917) et seq there is a discussion as to what evidence is required to prove a property to be wakf. Numerous authorities have been examined in the case in question, in some of which it was held no doubt that in order to constitute property wakf there must be a formal dedication. The ruling of the Privy Council reported as *Court of Wards v. Ilahi Bakhsh* (2) shows however that land which has been turned into a graveyard can become wakf by user, even if there be no express dedication. In Ameer Ali's Mahomedan Law, Vol. 1, Edn. 4, p. 406, it is stated that a cemetery or graveyard is consecrated ground and cannot be sold or partitioned. Even lands which are not expressly dedicated but are covered by graves are regarded as consecrated and consequently inalienable and nonheritable. Now it is found as a fact in the present case that practically the whole of the land of which one third has been sold is covered by graves. I do not think that the mere fact that it has been inherited from father to son is any sufficient reason for considering it not to be wakf. No doubt at first there were only a few graves in the land and the portion not actually covered by graves could be inherited. The whole of the plot is now a graveyard and it has therefore, in my opinion, become wakf by user and is therefore inalienable. I accordingly dismiss the appeal with costs.

R.M./R.K.

*Appeal dismissed.*

(1) [1917] 33 P. R. 1917=38 I. C. 387.

(2) [1913] 40 Cal. 297=27 P. R. 1913=40 I. A. 18=17 I. C. 744 (P. C.)

## A. I. R. 1919 Lahore 182

LEROSSIGNOL AND WILBERFORCE, JJ.

*E. D. Dignasse, Official Liquidator—Appellant.*

v.

*Chajju Ram and another—Respts.*

Misc. First Appeal No. 1205 of 1918, Decided on 8th July 1918.

**Companies Act (6 of 1882), S. 142—Official Liquidator—Resignation—Sanction of Court is necessary.**

An Official Liquidator is not at liberty to resign without the sanction of the Court which appointed him. [P 183 C 1]

*B. R. Suri, Herbert and L. James—*for Appellant.

*Santanam for Petman and Balwant Rai for Chajju Ram—*for Respondents.

**Judgment.**—On 14th January 1918 the appellants, who are the Official Liquidators of the Amritsar and People's Banks, tendered their resignation of their office, and this is an appeal from the order of a Single Bench of this Court disposing of that application and accepting the resignation subject to certain conditions. At the opening of the case, Mr. Puri, on behalf of the appellants, requested the Court to sanction the appearance on behalf of the appellants of Mr. Langford James, an advocate of the Calcutta High Court who is not however enrolled in this Court; and after some discussion regarding the treatment meted out in a recent case in the Bombay High Court to an advocate of this Court, we decided as a special case to hear Mr. James, on the strict understanding that our action should not be regarded as establishing a precedent and should not work prejudice to any action which this Court may see fit to take in the matter, and more particularly upon the assurance given to us by Mr. James himself that, so far as he was aware, no rule existed in the Calcutta High Court whereby an advocate of this Court would be restrained from appearing before that Court. Before us three main points have been urged on behalf of the appellants:

(1) That an Official Liquidator is competent to resign at will and that the liquidating Court has no say in the matter; (2) that in this case, at any rate, even if the resignation of the Official Liquidators was subject to acceptance by the liquidating Court, the liquidators had shown good cause why their resignation should be accepted; (3) even if the appellants failed on two preceding arguments



it was contended that the quantum meruit fixed by the learned Judge in Chambers was altogether an inadequate remuneration for the efforts of the liquidators. Our findings in brief on these three points are that an Official Liquidator is not at liberty to resign without the sanction of the Court which appointed him and that in the present case the Official Liquidators have made out no good case why their resignations should be accepted. With regard to the third point, it is impossible for us to say, inasmuch as there is no evidence upon the record, whether the rate of remuneration proposed by the learned Judge in Chambers is adequate or not; but inasmuch as the appellants have expressed before us no desire to resign except unconditionally, we see no need to go into this question at the present juncture. Should however the appellants on some later date desire to retire from their post on terms, the adequacy of the rates proposed by the learned Judge could be reconsidered. According to the rules made under the English law, resignation of the Official Liquidator may be accepted by the contributories and the creditors, but if those bodies do not accept the resignation, it is the Court which decides finally whether the resignation is to be accepted or rejected. The law in England is to this effect:

A liquidator appointed by the Court may resign or, on cause shown, be removed by the Court. Here the words "on cause shown" obviously refer only to the removal by the Court. The Indian law is contained in S. 142, Companies Act which runs: "Any official liquidator may resign or be removed by the Court on due cause shown." It will be observed that in the Indian Act the construction of the section differs very considerably from that of the English Act, and we must hold that such a marked deviation was made of set purpose in order to leave no doubt that the words "on due cause shown" govern not only the removal by the Court but also the resignation. On these grounds we hold there is nothing in the law justifying the proposition that an Official Liquidator can resign at will without securing the concurrence of the liquidating Court. The real question indeed is one of contract: at the time of his appointment, what did the Official Liquidator undertake to do? And to answer this question reference must be had

to the order of appointment. Now, the appellants were appointed to liquidate the insolvent banks and it is quite clear that the appointment contemplated the complete liquidation by the appellants of the insolvent concerns. Their remuneration, as has been found by another Bench of this Court, was fixed on an excessively generous scale but a sliding one, and it would be contrary to the principles of common sense, of business, and of equity that they should be permitted to resign at any moment on no better ground than caprice or resentment at inquiries regarding the nature of their past operations. A person who has entered into a contract may refuse to carry out that contract, but if he does so he is liable to pay forfeit, and the order of the learned Judge in Chambers amounts to an acceptance of the breach of the appellants' contract on their paying forfeit in the shape of a reduction of their remuneration. In the course of liquidation proceedings extending over four years, the appellants have acquired a wide and peculiar knowledge of the affairs of the insolvent banks. For the acquisition of this knowledge they had been liberally remunerated and if they are now permitted to resign, as it would be impossible for them to transfer their entire knowledge to their successor, it is obvious that the liquidation would be delayed and rendered more costly.

On these grounds we hold that the appellants are not entitled to resign unconditionally. We are not at all impressed by the argument that if the Official Liquidators have to give an account of their doings, the work of the liquidation will be hampered, but before us a fresh argument was adduced that Mr. Dignasse was in a bad state of health induced by the arduousness of his labours as liquidator. Inasmuch however as there is no evidence on this point on the record, as it was not mentioned by the appellants in their application to resign and finds no place in the grounds of appeal to this Court, we can pay no attention to it. Other minor matters are mentioned in the grounds of appeal but none of them have been mentioned before us, and we hold them to be of no force. For these reasons, we dismiss the appeal with costs which must be paid by the appellants personally.

R.M./R.K.

*Appeal dismissed.*



## \* A. I. R. 1919 Lahore 184

CHEVIS AND LESLIE JONES, JJ.

*Kapur Singh*—Convict—Appellant.

v.

*Emperor*—Opposite Party.

Criminal Appeal No. 803 of 1917, Decided on 26th November 1917, from order of Sess. Judge, Gurdaspur, D/- 8th September 1917.

(a) Penal Code (1860), S. 302 — Circumstantial evidence held sufficient to justify finding of murder.

It was found that the corpse of the deceased, a boy, proved to have been murdered by a sharp-edged instrument was found floating in a canal on 5th April 1917; that the accused had an unnatural intimacy with the deceased; that the deceased and the accused were seen in company on the evening of 30th March after which the deceased was never seen alive again; that the accused pointed out a spot in the canal where he said he had thrown a darri and a gandasa and that a darri and a gandasa were actually found in the canal bed at that spot :

*Held* : that these facts were sufficient to justify the finding that the accused murdered the deceased.

[P 187 C 1]

(b) Evidence—Admissibility of—Objection taken as to admissibility of evidence—Court must at once decide question — If evidence held inadmissible it should not find place on record— If held admissible evidence of all witnesses on point should be recorded.

Where during the course of a trial an objection is taken to the admissibility of a piece of evidence, it is imperative for the trial Judge to decide at once whether the evidence tendered is admissible. If he holds it to be inadmissible he should not let it find a place on the record and the assessors should be warned that anything that was said in their hearing on the point must not be taken into consideration : should the Judge decide that the evidence is admissible he should take and record the evidence of all the witnesses on the point.

[P 186 C 2]

\* (c) Evidence Act (1872), S. 27—Accused charged with murder making statement as to having thrown darri and gandasa in canal—Articles recovered by police from neighbouring village as result of statement of boy that articles were found in place pointed out by accused—Statement of accused held admissible in evidence.

The accused made a statement during investigation by Police as to his having thrown a darri and a gandasa into the canal. In consequence of the statement the police recovered the darri and the gandasa from a neighbouring village, having discovered from a boy the fact that the darri and gandasa had been found in the place pointed out by the accused:

*Held* : that there was immediate connexion between the statement and the discovery and that the statement was admissible in evidence.

[P 186 C 1]

*Nand Lal*—for Appellant.*Herbert*—for the Crown.

**Judgment.** — The appellant *Kapur Singh*, aged 30, has been convicted of the

murder of *Rashid Ali*, and sentenced to death. The case is before us on appeal and also under S. 374, Criminal P. C., for orders as to confirmation of the death sentence. The facts of the case are fully stated in the judgment of the learned Sessions Judge, and it is unnecessary to repeat them.

The first point urged before us is that it is not proved that the corpse discovered floating in the canal on 5th April 1917 was that of *Rashid Ali*, whom the prosecution allege to have been murdered on the night of 30th-31st March 1917. According to the evidence of the father and brother of the deceased, *Rashid Ali*'s age was about 17, but the age entered on the post mortem report is 29. This age was however entered by the police, who are no experts in such matters and may have been misled by the swollen appearance of the corpse after it had been 6 days in water. The Assistant Surgeon says the body appeared to be that of a man 20 or a year or so older. Considering the condition of the corpse we cannot see that there is anything in this evidence to prove that the body was not that of *Rashid Ali*. The same remarks apply to the fact that the Assistant Surgeon describes the body as that of a well built stout man. There is abundant evidence of relations and school-fellows and others as to the identity of the corpse, even though this evidence rests only on identification of the photograph of the corpse. There is also further evidence as to the identity of the clothes. *Rashid Ali*'s relations would be only too glad to learn that he was still alive and we do not believe that they would have made false statements as to the identity, especially considering the awkward consequences of such statements to themselves if *Rashid Ali* were later on to put in an appearance. Nor can we believe that it is merely a case of mistaken identity in view of the very positive evidence as to the clothing given by *Rashid Ali*'s sister (P. W. 8) and others. Then it is urged that the body could not have been in the water from 30th March to 5th April without being noticed, and that in such a length of time it would have floated much further down stream. Here the argument is that even if the corpse be that of *Rashid Ali* the murder must have been later than 30th or 31st March and cannot have been committed by *Kapur Singh*, who



was admittedly in Allahabad by 2nd April. But there is nothing to show us how long the body remained at the bottom of the canal. It may have been weighted, in which case it would not rise till the weights had become detached. As to the distance it travelled, it may have been detained for some time by catching in some obstacle on the way. There appears to be nothing in the medical evidence inconsistent with the theory of a murder on the night of 30th or 31st March. The medical evidence points clearly to murder by means of a sharp-edged weapon such as a gandasa. We hold it fully proved that the body was that of Rashid Ali, and that Rashid Ali was murdered.

The next question is whether it is proved that the appellant was the murderer. The prosecution alleged that there had been an illegal intimacy between appellant and Rashid Ali and that the former had taken Rashid Ali away from home once or twice before. On these points there is a mass of oral evidence, and in addition we have the fact that Rashid Ali's father had complained and the police had started inquiries, but that the matters had been dropped at the instance of the boy's father, who seems to have been assured that the intimacy had been broken off and would not be renewed. One of the explanations offered by the defence for appellant's going as far away as Allahabad to enlist, when he could easily have enlisted in his own district, is that he went away to escape being worried by the police in connexion with the complaint of Rashid Ali's father. The prosecution evidence proves clearly that Rashid Ali attended the Mission school at Dhariwal till 20th March, when the school broke up till 2nd April, that from 20th to 30th March he was at Faizulla Club where his father lived, and that on the 30th he went to Gurdaspur where he visited his brother Fazal Ahmad (P. W. 14), returning to Dhariwal by train that evening in company with Ram Lal (P. W. 29). Munshi Ram (P. W. 28) deposes that that evening he saw Rashid Ali pass his shop followed by Kapur Singh. This is the last that any of the witnesses professes to have seen of him, excepting Jagat Singh Lambardar (P. W. 34) who deposes that he saw Kapur Singh and a boy going along the bank of the Rajbaha from the direc-

tion of Pasnawala (appellant's village) towards Gurdaspur that night.

The learned Sessions Judge does not rely on the evidence of Jagat Singh, though he accepts that of Munshi Ram. It is of course true that evidence of the sort is easy to produce, but still in the absence of any signs of partiality or hostility we see no good reason for rejecting the evidence of either of these witnesses. It is urged that Jagat Singh wanted to please the police as he was implicated in an abduction case, but Jagat Singh says he was not an accused person in that case. After 30th March nobody ever saw Rashid Ali alive. It is true that according to the police diaries he was marked as absent in the school register on 2nd and 3rd April, but present on 4th and 5th, but there is a mass of oral evidence to show that he was not present on the 2nd when the school reopened, or any subsequent day. And seeing that his dead body was found in the canal on 5th April, the entry as to his presence in school on that day must be incorrect. The above entry is cited as a proof that the dead body found is not that of Rashid Ali, but for reasons already given we are fully satisfied as to the identity of the corpse. We note that the learned Sessions Judge says that the schoolmaster Inayat Masih should have been produced with the registers. We can only remark that if this was the view of the Sessions Judge he should have called this witness with the registers.

The evidence of the father and brother of the boy is that when the boy did not return home his father began to make inquiries for him. This shows too that he was missed by his relatives long before 4th-5th April. Had he really been attending school on the 4th and 5th, his relatives would have been surely too glad to be able to say that a dead body found in the canal on 5th April could not be that of Rashid Ali. As set forth in the judgment of the learned Sessions Judge, the connexion between the disappearance of Rashid Ali and the corpse found in the canal was not discovered till early in May. The police then started to search for Kapur Singh, and it was discovered that he had enlisted in Allahabad. He was brought back to Gurdaspur and on the 12th May took the police to a spot just below the Tal-



wandi Rattowal bridge, where he pointed to a spot where the police removed some bricks and plaster this however is of no consequence as no bloodstains were found on them; and also stated that he had there thrown into the canal a gandasā, a darri and other things. A boy standing by promptly gave information that a gandasā had been found and a visit to the neighbouring village led to the production of a gandasā and also of a darri. Evidence which seems quite disinterested proves that when the canal was run dry for repairs in the early part of Besakh a boy Alla Din (P. W. 24) while playing in the canal bed discovered and unearthed a gandasā which he gave to Suba (P. W. 26) who produced it from his house during the police inquiry. Two or three days earlier Sawan (P. W. 26) had found the darri partly buried in the sand and had taken it home; the police recovered it from his wife (P. W. 30). We note that no blood marks were found on the darri or gandasā but it must be remembered that they had been lying in water or sand for some considerable period. Din Muhammad (P. W. 23) recognizes the darri as one he made for Kapur Singh and Mohanda (P. W. 29) says he once washed it for Kapur Singh though he says he never washed anything else for Kapur Singh. Maghar Singh (P. W. 31) says he made the gandasā for Kapur Singh. Such evidence is easy to criticise but if Kapur Singh had no hand in the murder how was he able to point out to the police the spot in the canal where the gandasā and darri had been found?

The admissibility of the statement of Kapur Singh as to having thrown a darri and gandasā into the canal is strongly contested by the learned counsel for the appellant and we note that the Sessions Judge seems to have pondered for a long time before holding this evidence to be admissible. We have no hesitation in holding it to be admissible. It is not merely that in consequence of this statement the police recovered the darri and gandasā from the neighbouring village; there is the fact that in consequence of this statement the police discovered the fact that the darri and gandasā had been found in the place pointed out to them by Kapur Singh. There is an immediate connexion between the statement and the discovery and we hold the statement to be admissible.

The first witness on this part of the case was Shib Dial (P. W. 23), whose statement "Kapur Singh said I threw a boot gandasā pagri and darri into the canal here" was recorded by the learned Sessions Judge. Objections as to the admissibility of this evidence were promptly raised and the learned Sessions Judge reserved the point "for arguments" which apparently meant for arguments at the end of the trial. Buta Singh (P. W. 27) deposed: "Kapur Singh said he had thrown a gandasā etc., in the canal." This too was recorded "Subject to objections to be argued and discussed later." Sultan Mulk Sufedposh (P. W. 32) is the next witness on the point. Here all that is recorded on the point is "Kapur Singh said something." The learned Sessions Judge was again pressed to decide the question of admissibility but said "my findings will be given when I decide the case." So far as we are able to discover the question of admissibility was not decided till after the first trial was closed and it does not appear whether the assessors were ever advised as to this evidence being admissible or not.

In such a case it is imperative for the Judge to decide at once whether the evidence tendered is admissible. If he holds it to be inadmissible he should not let it find a place on the record and the assessors should be warned that anything that may be said in their hearing on the point must not be taken into consideration. Should the Judge decide that the evidence is admissible he should take and record the evidence of all the witnesses on the point. Here the Sessions Judge has done neither the one thing nor the other. He has recorded the evidence of Buta Singh and Shib Dial on the point "Subject to objections" but when recording the evidence of Sultan Mulk Wasawa Singh Sufedposh and the two Sub Inspectors, who obviously all came prepared to give evidence on the point, the Sessions Judge has omitted to record anything as to the statement made by the appellant. Whether in the witness-box they were allowed to repeat this statement is not clear. In the evidence of the two Sub-Inspectors we find asterisks, which looks as if these two witnesses had said something which had not been recorded. The consequence is that the evidence tendered was either not



heard in full, or has not been fully recorded. The record of Buta Singh and Shib Dial is however sufficient to satisfy that the appellant did not make the statement in question. The appellant made no statement in the Magistrate's Court beyond denying the charge and accusing the police of ill-treatment. Before the Sessions Judge he stated he went to Lahore on 24th March and on the 29th left for Delhi by the 2.30 p. m. train and went on to Saugar and thence to Allahabad where he enlisted. He had several witnesses present, but after consulting his counsel he declined to produce any defence evidence.

Since the hearing of the appeal a petition has reached this Court from the appellant in jail, in which he urges that his defence evidence shall be recorded and that he only declined at the trial to produce his witnesses on being given to understand by his counsel that the Sessions Judge considered the case so weak that there was no need to produce any defence. We do not suppose that there is any truth in the statement that counsel so misled the appellant, and we see no sufficient reason to admit evidence for the defence now. If the appellant had any reliance on the strength of his defence, we presume that he would have produced his witnesses at the trial. We find it proved that the appellant had an unnatural intimacy with the deceased, that the appellant and deceased were seen in company on the evening of 30th March after which the deceased was never seen alive again, that the deceased was murdered and his dead body found in the canal, that the appellant pointed out a spot in the canal where he said he had thrown a darri and gandasa and that a darri and gandasa were actually found in the canal bed at the spot. In our opinion, these facts are fully sufficient to justify the finding that the appellant murdered the deceased. With this finding arrived at by the assessors and the learned Sessions Judge, we agree. Whether the appellant committed the murder single-handed we are unable to say, but it is unnecessary to come to any finding on this point.

It is true that one Bhagat Singh, son of Tara Singh Lambardar, was suspected by the police of being concerned in the murder, and from the evidence it would appear that Bhagat Singh was either

present or in the neighbourhood when the appellant showed the place where he had thrown the gandasa and darri, but still we see no reason to suppose that Tara Singh has fabricated evidence or that it was any one other than the appellant alone who pointed out the above place and stated that he had thrown there the gandasa and darri. It is urged that as the medical evidence shows that the deceased was a more powerful man than the appellant, the latter could not have killed the deceased single-handed. But even a weak man can disable a strong man if the former learned. As to motive it is impossible to say what was the motive which led to the murder, but it is by no means a rare case for a man to kill his mistress or a boy with whom he has had an unnatural intimacy. Such offences sometimes arise out of jealousy, sometimes out of resentment at the intimacy being broken off, through in the present case it is not easy to say why the deceased, if he had irrevocably broken off the intimacy, should have been persuaded not to return to his home but to go to the place where he was murdered. But whatever the motive may have been, we are satisfied from the evidence that the appellant is guilty of the murder. We uphold the conviction and confirm the sentence. Appeal is dismissed.

R.M./R.K.

*Appeal dismissed.*

### A. I. R. 1919 Lahore 187

SHADI LAL, J.

*Nathu*—Plaintiff—Appellant.

v.

*Mt. Chuhri and others*—Defendants—Respondents.

Second Appeal No. 1130 of 1918, Decided on 21st November 1918, from decree of Dist. Judge, Gujrat, D/- 4th February 1918.

Suits Valuation Act (7 of 1887), S. 9—Punjab Chief Court Rules, R. 1 (1)—Suit for restitution of conjugal rights with injunction restraining certain persons from preventing union—Valuation for purposes of jurisdiction is Rs. 1,000—Prayer for injunction does not affect valuation.

Where a plaintiff sues for restitution of conjugal rights and for an injunction restraining certain persons from preventing the union of the plaintiff with the lady whom he claims to be his wife, the value of the suit for purposes of jurisdiction is Rs. 1,000. The prayer for an injunction being merely a relief ancillary and incidental to the main relief claimed does not affect that value.

[P 183 O 1]



*Muhammad Hussain*—for Appellant.

*Mukand Lal Puri*—for Respondents.

**Judgment.**—This was a suit for the restitution of conjugal rights brought by the plaintiff against Mt. Chuhri and also for an injunction restraining two persons from preventing the union of the plaintiff and the lady whom he claimed to be his wife. The sole contention for the appellant is that the Munsif had no jurisdiction to adjudicate upon the claim, inasmuch as the value of the first relief alone could not be less than Rs. 1,000 and that the value of both the reliefs must therefore exceed Rs. 1,000. I am unable to accede to this contention. The rule framed by this Court under the Suits Valuation Act provides that the value for the purpose of jurisdiction of a suit instituted by the plaintiff for a decree against the other party to the alleged marriage, either alone or with other defendants for restitution of conjugal rights is Rs. 1,000. This rule it seems to me covers the present suit; the prayer for an injunction is merely a relief ancillary and incidental to the main relief claimed and does not affect the value for the purpose of jurisdiction. The judgment of a single Bench in Civil Appeal No. 1681 of 1915. *Mt. Bhani v. Bansi* (1) is directly to the point and I see no reason to dissent from the view taken therein.

Accordingly I hold that the Munsif had jurisdiction to entertain the suit, and upon the finding of fact arrived at by the learned District Judge, there is no ground for a second appeal. The appeal is therefore dismissed with costs.

R.M./R.K. *Appeal dismissed.*

(1) [1916] 33 I. C. 1002.

### A. I. R. 1919 Lahore 188

SCOTT-SMITH AND BROADWAY, JJ.

*Santa Singh*—Defendant—Appellant.  
v.

*Ralla Singh and others*—Plaintiffs—Respondents.

Misc. Appeal No. 1896 of 1917, Decided on 28th May 1918, from order of Dist. Judge, Ludhiana D/- 29th May 1917.

**Evidence Act (1872), S. 78 (6)**—Suit on foreign judgment—Provisions of S. 78 (6) not complied with—Court can grant time to plaintiff to obtain and file requisite certificate—Civil P. C. (1908), S. 13.

Where in a suit on a foreign judgment it appears that the provisions of S. 78 (6) have not

been complied with, the Court has power to grant time to the plaintiff to obtain and file the requisite certificate. [P 188 C 1]

*Tek Chand*—for Appellant.

*Sheo Narain*—for Respondents.

**Judgment.**—The facts of this case are briefly these: Santa Singh, son of Harnam Singh, brought a charge against three persons, Santa Singh, son of Hukam Singh, Chanan Singh and Ralla Singh under S. 394, I. P. C., at Singapore. The said three persons were acquitted and of them Santa Singh, son of Hukam Singh, and Chanan Singh, instituted two separate suits each claiming 500 dollars as damages for malicious prosecution and wrongful confinement. The cases were apparently tried together and on 31st December 1915 judgment was entered in favour of each of the two plaintiffs against Santa Singh, son of Harnam Singh for 350 dollars and costs or Rs. 682-15-0. These two plaintiffs assigned their decrees in favour of Ralla Singh, who instituted a suit on the judgments assigned to him in the Ludhiana District where Santa Singh, son of Harnam Singh, resides. The trial Court dismissed the suit on two grounds:

(1) That the certificate required by S. 78, sub-Cl. (6), Evidence Act, was not attached to the judgments sued upon and (2) that the judgments were not in accordance with the provisions of O. 20, R. 4, Civil P. C., and further did not comply with *Badri Das v. Nathu Mal* (1). On appeal by the plaintiff the learned District Judge, Ludhiana, held that although the provisions of S. 78 (6), Evidence Act, had not been complied with, the plaintiff should have been allowed time to get the requisite certificate and further held that the trial Court had erred in assuming that the provisions of the Civil Procedure Code were in force in Singapore and that judgments in Singapore were governed by O. 22, Rr. 4 and 5, Civil P. C. The case was accordingly remanded under O. 41, R. 23, Civil P. C., the learned District Judge framing the following issues:

(1) What procedure is laid down for the civil Court presided by a District Judge in trying a suit for the value exceeding Rs. 1,000 in Singapore Settlement? (2) What method is followed for attesting judicial records? (3) Whether the decree in question was passed by the

(1) [1901] 112 P. R. 1901.



District Judge, Singapore, and if so were any issues framed and brought to the notice of the defendant? Against this order of remand the defendant Santa Singh has preferred this second appeal through Bakshi Tek Chand and we have heard Mr. Sheo Narain on behalf of the plaintiff-respondent. Mr. Tek Chand urged that the lower appellate Court had wrongly granted the plaintiff time to rectify the omission with regard to S. 78, Evidence Act. After due consideration of the arguments of the learned counsel we are of opinion that the Court had power to grant the plaintiff time, and that in the circumstances of the case the lower appellate Court acted rightly. It was then urged on behalf of the appellant that inasmuch as the judgments sued upon were not judgments on the merits, S. 13 (b) and (d), Civil P. C., were applicable and that it would be necessary for the plaintiff to prove his case apart from the judgments sued upon. Mr. Sheo Narain pointed out that the learned District Judge had in his order of remand specifically directed an inquiry into the very matters now complained of.

It seems fairly obvious that the primary Court was wrong in assuming that the procedure in the Straits Settlements was that laid down in the Civil Procedure Code. As a matter of fact Mr. Tek Chand referred to Piggot on Foreign judgments, and himself contended that the procedure in the Straits Settlements was the same as that in force in England. That being the case, it is obvious that the primary Court should not have assumed that O. 20, R. 4, Civil P. C., applied and had been contravened by the Judge of the District Court at Singapore. The issues sent down for trial by the learned District Judge raise the very points which the primary Court has decided on presumptions, and the question whether a judgment (such as the judgments sued upon in this case) is in accordance with the law in force at Singapore is covered by, and must be decided in the decision on issue 1. Mr. Tek Chand referred us to *Keymer v. Viswanatham Reddi* (2) but we are unable to see that that decision has any real bearing on the point before us at this stage. The judgment sued upon in that case was obviously, on the face of it, not a judgment on the

merits, whereas in the present instance it remains for the Courts to decide whether these judgments now sued upon are or are not judgments on the merits. We accordingly dismiss this appeal with costs.

R.M./R.K.

*Appeal dismissed.*

### A. I. R. 1919 Lahore 189

SHADI LAL AND LEROSSIGNOL, JJ.

*Hazura Singh* — Defendant — Appellant.

v.

*Sundar Singh and others*—Plaintiffs—Respondents.

Misc. First Appeal No. 937 of 1917, Decided on 17th February 1919, from order of Dist. Judge, Jullundur, D/- 15th March 1917.

(a) Land Acquisition Act (1 of 1894), Ss. 30 and 54—Decision on reference under S. 30—Portion of award—Appeal lies.

The decision of a Court given under a reference made under S. 30 is a portion of an award and is appealable under S. 54 of the Act.

[P 190 C 1]

(b) Land Acquisition Act (1 of 1894), Ss. 18 and 30—Distinction between reference under S. 18 and under S. 30 explained.

The only distinction between a reference made under S. 18 and one made under S. 30 thereof, is that the reference under the latter section is made solely on the question of title by the Acquisition Officer of his own motion, while the reference under the former section is made on the application of persons interested in the compensation money and not by the acquiring officer on his own motion.

[P 190 C 1]

*Badr-ud-din and Faqir Chand*—for Appellant.

*Dalip Singh*—for Respondents.

**Judgment.**—This appeal arises out of proceedings taken by Government under the Land Acquisition Act 1 of 1894. A portion of the land taken up was the property of Mt. Partapi, a Jat widow, who had made a gift of it to Hazura Singh, the present appellant. The Acquisition Officer made his award on 15th June 1916 in favour of Hazura Singh. An application dated 8th May 1916 by Sundar, one of the widow's reversioners, to the effect that Hazura Singh was not entitled to the compensation money, the Acquisition Officer rejected, whereupon Sundar put in a similar application to the Deputy Commissioner, who rejected it but directed Sundar to make a further application to the Acquisition Officer. Upon that second application the Acquisition Officer by order of 11th August 1916 made a refer-

(2) A. I. R. 1916 P. O. 121=38 I. O. 688=44 I. A. 6=40 Mad. 112 (P. O.).



ence to the District Court which he considered to be a reference under S. 30, Land Acquisition Act.. The District Judge taking action on that reference has held that Hazura had no better title in the land acquired than the widow and consequently was entitled during the lifetime of the widow only to interest on the compensation money and he has directed that the compensation money be held in deposit and invested and the interest thereof be paid to Hazura Singh.

Hazura Singh appeals, and the grounds urged before us are that the reference by the Acquisition Officer was irregular inasmuch as no reference could have been made under S. 30 but under S. 18; that the order made by the District Judge is wrong inasmuch as he should have directed that the money should be invested in the purchase of land; that inasmuch as a widow can sell land for necessity the compensation should have been paid to the appellant; and finally, that the respondent, Sundar, is not the only reversioner and as his was the only application made within time to the Land Acquisition Officer, only his share of the compensation money should have been withheld from the appellant.

For the respondent it is contended that inasmuch as the reference to the Court was made under S. 30 of the Act no appeal lies. In our opinion the contentions of neither side can be upheld. To dispose first of the respondent's contention, we hold that the decision of a Court given under a reference made under S. 30 of the Act is a portion of an award and consequently an appeal lies against it under S. 54 of the Act. In fact we draw no distinction between a reference made under S. 18 of the Act and one made under S. 30 except this: that the reference under S. 30 is made solely on the question of title by the Acquisition Officer of his own motion, whilst the reference under S. 18 is made on the application of persons interested in the compensation money and not by the acquiring officer on his own motion. The first order passed by the Acquisition Officer on Sundar's second petition to him was that a reference would have to be made under S. 18 of the Act, but in his final order of 10th August 1916 he purported to make the reference under S. 30, but inasmuch as his reference was made clearly on the application of an objector the reference

must be regarded as one made under S. 18 of the Act.

On the merits we see no reason whatever to interfere. The appellant has referred to S. 32 of the Act, but the case is really governed by S. 31 (2) and S. 33 of the Act. Prima facie the gift by the widow to appellant was invalid and the compensation money for the land remains impressed with the character of the land and inasmuch as Hazura Singh's title to the land is in doubt, so also is his title to the compensation money so far as the principal at any rate is concerned. Indeed we are informed that a declaratory decree has been obtained by reversioners to the effect that the gift by the widow to Hazura Singh shall not affect their reversionary rights and inasmuch as such a decree obtained by one reversioner is available for the protection of the rights of other reversioners, the objection of Sundar protects the whole property. For these reasons we see no reason to interfere and dismiss the appeal with costs.

R.M./R.K. *Appeal dismissed.*

### A. I. R. 1919 Lahore 190

DUNDAS, J.

*Mt. Afiman and another*—Defendants  
—Appellants.

v.

*Hamid-ud-din Husain and another*—  
Plaintiffs—Respondents.

Second Appeal No. 663 of 1919, Decided on 6th June 1919, from decree of Dist-Judge, Karnal, D/- 20th December 1918.

(a) Civil P. C. (1908), S. 92—Scope.

Section 92, is not applicable to a case where the relief claimed is not one of the reliefs mentioned in the section. [P 191 C 2]

(b) Civil P. C. (1908), S. 92—Wakf—Person interested can sue to protect property.

Any person interested in a wakf can sue to protect wakf property against strangers. [P 191 C 2]

(c) Civil P. C. (1908), S. 92—Wakf—Mortgage by manager—Suit to set aside alienation and for restoration of property to trust is maintainable.

When wakf property is mortgaged by the manager, any person interested in the wakf can sue to have the alienation set aside and the property restored to the trust: 5 All. 497 and 7 All. 178, Foll. [P 192 C 1]

*Bihari Lal and G. L. Gulati*—for Appellants.

*Niaz Ali, Sayad Ali and Hamid-ud-din Husain*—for Respondents.



**Judgment.**—The appellants are mortgagees of some 5½ acres of land including two wells situated at Sonepat, District Karnal, holding a mortgage deed of 10th June 1916 for Rs. 1,700 executed by one Sayad-ud-din, describing himself as the manager of the land. The present suit was brought by two persons Hamid-ud-din and Sajjad Ali, who are collaterals of Sayad-ud-din and also members of the Musalman Shia community of Sonepat: they asked first, for a declaration that this property is wakf secondly, that the above mortgage be declared ineffective as against the wakf property, and thirdly, that the mortgagees be ejected and the land restored for the purposes set out in the dedication deeds of 1885. Both the Courts below have concurred in finding that there has been a clear dedication of this land for religious purposes constituting it a wakf and public trust. They have also concurred in finding that the manager for the time being is incompetent to alienate any portion of the property except possibly if absolutely necessary for the administration of the trust. Both the Courts found that the consideration of this mortgage consists largely of an accumulation of interest on some old debts of small amount contracted by former managers, that the management has not been prudent and that it cannot be said that the present mortgage is shown to be for the necessity of the wakf, and in fact it is very doubtful whether the original expenditure may not have been on account of the private necessities of the manager. The first Court has concluded that the mortgagees can fairly claim to be paid Rs. 300 as compensation for the repairs and improvements effected by them and has decreed the ejectment of the mortgagees on payment to them of this sum.

The lower appellate Court thinks that only Rs. 200 can be allowed to the mortgagees on this account, as that is the amount entered in the mortgage deed, but considers that the mortgagees are not liable to be ousted in the present suit. From this decision the mortgagees have appealed and the plaintiffs have filed cross-objections asking that a condition that the property should be restored to them should be embodied in the decree which should be enforceable by the ejectment of the mortgagees.

They also contend that this Rs. 200 should not be made a charge on the property. It will be convenient first to take the appeal by the mortgagees. The first ground of appeal that the property in dispute is not a public trust is not maintainable. This is a finding of fact in which both Courts have concurred. The second ground that the lower appellate Court was wrong in reducing the amount payable to mortgagees on account of the repairs from Rs. 300 to Rs. 200, appears to me to be just. It seems to be clear that the mortgagees have effected necessary repairs, repairs in fact, which were insisted upon by the authorities and were not optional, and that the cost of these was at least Rs. 300. There seems to be no reason why the plaintiffs or those members of the Shia community who wish to recover this property should not reimburse the mortgagees for these moneys spent on the necessities of the property, which necessities are also the necessary expenses of the wakf. There is quite enough authority that S. 92, Civil P. C., is not applicable to a case like the present, where the relief claimed is not one of the reliefs mentioned in the section but if further authority be required, *Kazi Hassan v. Sagun Balkrishna* (1) is quite sufficient.

Any person interested in a wakf can sue to protect a wakf property against strangers. On ground 4 of appeal no doubt Sajjad Ali plaintiff signed one of the mortgages of 1889 but that was merely an assignment of the income of the property for a certain period and does not debar him from attaching subsequent alienations in which the nominal consideration is much heavier and the encumbrances more serious. No argument has been advanced in this Court as regards the applicability of S. 41, Specific Relief Act. Both Courts have found that the alienations taken as a whole were not for necessity, and this is a question of fact. And now to take the contentions, in the cross-objections, I have already remarked above that I see no reason why Rs. 300 should not be made a charge payable before the mortgagees can be ejected. The lower appellate Court was of opinion that perhaps a complicated procedure would be necessary before the mortgagees could

(1) [1900] 24 Bom. 170.



be got rid of. I think that the procedure suggested by him of first removing the existing muttawali, then appointing another and then inducing the new muttawali to bring a suit for possession amounts to a denial of the clear relief to which the present plaintiffs are entitled. In *Zafaryab Ali v. Bakhtawar Singh* (2) it was held that a suit by certain Mahomedans for the ejectment of a purchaser of buildings attached to a mosque was maintainable. The same view was upheld in *Jawahra v. Akbar Husain* (3). In the Bombay case *Kazi Hassan v. Sagun Balkrishna* (1) the two Judges were not entirely of the same opinion.

Parsons J. considered the wakf property could not be alienated and that any person interested in the endowment could sue to have the alienation set aside and the property restored to the trust. Ranade, J., considered that in the circumstances of the case the plaintiffs were incompetent to bring a suit for possession which could only be done by the muttawali at the time. The circumstances were very peculiar, as the property was not wholly an endowment. Several persons, besides the plaintiffs and actually including some of the defendants had a beneficiary interest in the property and he considered that on the suit as framed the plaintiffs could not obtain possession. In the present case I think that the opinion expressed in the Allahabad cases and by Parsons, J., is to the point and I therefore dismiss the appeal of the mortgagees, accept the cross-objections and restore the decree of the first Court. The parties will pay their own costs in this Court and the lower appellate Court.

R.M./R.K. *Appeal dismissed.*

(2) [1883] 5 All. 497.

(3) [1885] 7 All. 178.

### \* A. I. R. 1919 Lahore 192

RATTIGAN, C. J.

*Muhammad Hayat*—Complainant.  
v.

*Bhola and others*—Accused.

Criminal Revn. No. 521 of 1918, Decided on 28th June 1918, reported by Sess. Judge, Multan, D/- 24th April 1918.

\* Criminal P. C. (1898), S. 250—S. 250 does not apply to case in which complaint discloses offence triable by Court of Session,

although actually tried by Magistrate with S. 30 powers.

The provisions of S. 250 are inapplicable to a case in which the complaint discloses an offence triable by a Court of Session, even though it is actually tried by a Magistrate specially empowered under S. 30 of the Code. [F 193 C 1]

**Facts.**—Muhammad Hayat brought an accusation under S. 395, I. P. C., against Bhola and others in the Court of Mr. Hearn, Magistrate, with powers under S. 30, Criminal P. C. The Magistrate found the complaint vexatious and frivolous and ordered compensation of Rs. 50 to be paid by complainant to the accused.

**Grounds.**—Offences under S. 395, I. P. C., are triable by a Court of Session and the Chief Court's rulings, *Crown v. Qadu* (1) and *Crown v. Hamir Chand* (2), appear to lay it down that a S. 30 Magistrate cannot act under S. 250, Criminal P. C., when the accusation is of an offence triable by a Court of Session and not by a Magistrate. It is with reference to these rulings that Muhammad Hayat applies for revision.

On 15th March 1918 I issued notice to the other side and to Public Prosecutor for today. The applicant put in Talbana Re. 1 only as at first ordered by the office. The office then noticed that the respondents were many and sent a Parwana to applicant for more Talbana. Applicant was not at home and so respondents and Public Prosecutor have not been served. On reconsideration I think that the law as interpreted by authority allows no course other than to forward the record to the Chief Court with the proposal that the order to pay compensation under S. 250, Criminal P. C., be set aside as it was illegal. On the merits of the case I should not interfere, holding that the complaint was vexatious and frivolous. The effect of the rulings quoted appears to be that a complainant can make certain of avoiding being ordered to pay compensation by grossly exaggerating his complaint, i.e., by describing a trivial assault as an attempt to murder. The remedy would be, I presume, for the Court to see that summons was issued in the first instance for an offence triable by a Magistrate. In view of the Punjab rulings, *Crown v. Qadu* (1), *Crown v. Hamir Chand* (2), I forward this record to the Chief Court for orders.

(1) [1902] 26 P. R. 1902 Cr.

(2) [1902] 14 P. R. 1902 Cr.



**Judgment.**—The complaint filed in this case was one of an offence under S. 395, I. P. C., an offence triable by a Court of Session, and I agree with Reid, J., who held in *Crown v. Qadu* (1), that in such cases the provisions of S. 250, Criminal P. C., are not applicable, even though the offence is tried by a Magistrate specially empowered under S. 30 of the Code. I accordingly set aside the order awarding compensation and direct that the amount, if paid, shall be refunded.

R.M./R.K.

Revision accepted.

### A. I. R. 1919 Lahore 193

SHADI LAL AND DUNDAS, JJ.

*Gurkha Association, Simla*—Plaintiff-Appellant.

v.

*Mahomed Umar and others*—Defendants—Respondents.

Second Appeal 686 of 1915, Decided on 30th May 1919, from decree of Dist. Judge, Ambala, D/- 21st December 1914.

(a) Trade name—Company is entitled to injunction to restrain rival company from using similar name—No distinction exists between business concerns and charitable societies—Pecuniary loss is essential—Registration of new company and no objection by Registrar is immaterial.

A company is entitled to obtain an injunction to restrain a new company from carrying on the same kind of business as the old company under a name identical with or so similar to the plaintiff company's name as to be calculated to deceive the persons dealing with the plaintiff company. [P 193 C 2]

This principle is independent of the statutory rule found in the Companies Act, 1913, and does not recognize a distinction between business concerns and charitable societies, provided it is shown that the similarity in names would cause pecuniary loss. [P 193 C 2; P 194 C 1]

The fact that the new company has been registered and that the Registrar took no objection to the registration does not preclude the old company from obtaining an injunction to restrain the new company from carrying on the same kind of business as that of the old company under a name calculated to deceive the public. [P 194 C 1]

The Gurkha Association, a Society registered under Act 21 of 1860, sued certain persons for an injunction restraining them from using the term 'Gurkha Sabha' to describe the rival charitable institution alleged to have been recently founded by them. It was alleged that the plaintiff Association had been in existence for some time and was also known as the Gurkha Sabha, that persons sending subscriptions described it variously as the Gurkha Association or Gurkha Sabha and that the Society started by the defendants was likely to be mistaken for the plaintiff's and to divert to itself the money intended for the plaintiff.

*Held:* that the facts as set out in the plaint disclosed a cause of action and that the plaintiff's suit was maintainable. [P 193 C 2]

(b) Civil P. C. (1908), S. 9—Suit for mere honour or dignity does not lie—Malice is not essential.

A suit does not lie for a mere honour or dignity unconnected with any fees, profits or emoluments. 2 *Bom.* 476 *Foll.*; *Cowley v. Cowley*, (1901) *A. C.* 450, *Expl.*

Malice is not an essential ingredient of the cause of action in such cases. [P 194 C 2]

*Santanam*—for Appellant.

*Tek Chand* for *Muhammad Umar* and *Balwant Rai* for *Amar Singh*—for Respondents.

**Judgment.**—This was an action brought by the Gurkha Association, a society registered under Act 21 of 1860, against certain persons for an injunction restraining them from using the term "Gurkha Sabha" to describe the rival charitable institution alleged to have been recently founded by them. It is alleged in the plaint that the Gurkha Association has been in existence for some time, that it is known also by the name of Gurkha Sabha, that the persons who send donations or subscriptions to the institution describe it variously as Gurkha Association or Gurkha Sabha, and that the society started by the defendants is likely to be mistaken for the plaintiff and to divert to itself the money intended for the plaintiff. The Court below, without determining the issues of facts arising upon the pleadings of the parties, have dismissed the suit in limine, holding that the allegations made by the plaintiff do not disclose any cause of action. We have listened to the arguments advanced on both sides, and are not prepared to endorse the proposition of law that the facts as set out in the plaint do not confer upon the plaintiff a legal right to invoke the assistance of the Court.

We may clear the ground by stating that the principle of law is firmly established that a company is entitled to obtain an injunction to restrain a new company from carrying on the same kind of business as the old company under a name identical with or so similar to the plaintiff company's name as to be calculated to deceive the persons dealing with the plaintiff company. This principle is independent of the statutory rule, which is now to be found in the enactments relating to companies, vide, S. 11, Companies Act, 7 of 1913, which prohibits the registration of a company in



the name of a subsisting company which is already registered. We cannot therefore accede to the contention that, because Act 21 of 1860, which applies to the charitable societies, does not contain a provision similar to that applying to the companies registered under the Indian Companies Act, the principle upon which the statutory rule is based is inapplicable to a charitable society. It has been repeatedly held that the fact that registration has been accomplished, and that the Registrar took no objection to the registration, does not preclude the old company from obtaining an injunction to restrain the new company from carrying on the same kind of business as that of the old company under a name calculated to deceive the public: vide, *inter alia*, *Accident Insurance Co. v. Accident, Disease and General Insurance Company* (1).

It is contended on behalf of the defendants that the aforesaid rule applies only to business concerns, and that it cannot be extended by analogy to charitable societies. No authority in support of this contention is cited, and the principle, upon which the rule proceeds, does not recognize any such distinction, provided that it is shown that the similarity in names would cause pecuniary loss. In both cases the basis of action is monetary loss sustained or likely to be sustained by the plaintiff by reason of the defendant using the same or a similar name. It is true that the law does not in general recognize any exclusive right to the use of a name, and that an individual is entitled to adopt a name similar to that which his neighbour uses, so long as he does not adopt it in order to pass off his wares or business as being his neighbour's. Nor does a suit lie for a mere honour or dignity unconnected with any fees, profits or emoluments: vide, *Sangapa v. Gangapa* (2). The defendants rely upon the judgment of the House of Lords in *Cowley v. Cowley* (3), which only shows that the assumption of a title or honour by a person not strictly entitled to it does not give rise to a cause of action. As pointed out by Lord Lindley in that case:

"Speaking generally, the law allows any person to assume and use any name, provided its use is not calculated to deceive and to inflict pecuniary loss."

This proviso indicates that if the use

of the name is calculated to deceive and to inflict pecuniary loss, then the person who is likely to suffer the loss would be entitled to invoke the aid of the Court. There may not be property in the name, but where, as stated by the plaintiff, the defendants by adopting the title identical with or similar to the plaintiff's title lead the public to mistake their institution for the plaintiff institution, there is, in our opinion, an infringement of legal right. Further, the plaintiff alleges actual or prospective pecuniary loss. It appears to us that the requirements of the law have been duly fulfilled. In this connexion the judgment in *Society of Accountants and Auditors v. Goodway* (4) is instructive. In that case it was held that the designation "incorporated accountants" had come to denote membership of the plaintiff society, and that the unauthorized use of it by the defendant inflicted injury on the plaintiff society, in respect of which it was entitled to maintain an action. It was further held that the plaintiff society had a pecuniary interest in preventing the defendant association from attempting, by representations and inducements held out to the members of the profession, to reduce the status of the plaintiff society by conferring improperly an indication of that status upon its own members. The Court, quoting a passage from the judgment of a case decided by the Court of Session in Scotland, observed that

"a body, however incorporated, has a right to prevent persons who are not members of it from representing themselves to be members of it."

It seems that this observation is fully applicable to the case before us. We are not prepared to endorse the proposition that malice is an essential ingredient of the cause of action. On this point we consider it necessary to refer to the judgment of the House of Lords in *North Cheshire & Manchester Brewery Co. Ltd. v. Manchester Brewery Co. Ltd.* (5), where Lord Shand made the following pertinent observations:

"I further agree that it is not necessary in a case of this kind that an improper motive or a fraudulent intention should be made out. Here the simple question to be decided is, assuming bona fide on the part of the appellants, whether or not the use of this particular name is calculated to injure another firm which had been using that same name, I believe for a period of eight years. Whether this question arises under

(1) [1885] 54 L. J. Ch. 104.

(2) [1877-78] 2 Bom. 476.

(3) [1901] A. C. 450.

(4) [1907] 1 Oh. 489.

(5) [1899] A. C. 83.



statute or under the Common Law, the issue which the Court or this House has to decide appears to me to be the same. Was the taking of the name of 'The Manchester Brewery Company, Limited,' calculated to induce the belief amongst the public or the trade that the business which was carried on by the respondents is now business carried on by the new firm."

The vital question in this case is whether the persons dealing with the old institution would send their donations or subscriptions to the new institution believing that they were really sending them to the old institution. Upon that question evidence can be adduced by both the parties. For the aforesaid reasons we are of opinion that the allegations in the plaint disclose a cause of action, but whether that cause of action can be established or not is not a matter which is before us and which can only be decided upon evidence. We accordingly accept the appeal and setting aside the decrees of the Courts below remit the case for decision on the merits. The court-fees on the memorandum of appeal in this Court as well as on that preferred to the District Judge shall be refunded, and other costs shall abide the event.

R.M./R.K.

*Appeal accepted.***A. I. R. 1919 Lahore 195**

SHADI LAL, J.

*Hoshnak Ram-Ganga Ram — Petitioners.*

v.

*Emperor—Opposite Party.*

Criminal Revn. No. 1320 of 1918, Decided on 31st January 1919, from order of Sess. Judge, Lyallpur, D/- 9th October 1918.

(a) Petroleum Act (8 of 1899), S. 11—Person purchasing petrol from agent of company who in order to give delivery has to procure it from another place, cannot be convicted of "transporting" petroleum.

A person who purchases petroleum from the agent of a company who, in order to give delivery has to procure it from another place, cannot be convicted of "transporting petroleum" within the meaning of S. 11. [P 195 C 2]

(b) Petroleum Act (8 of 1899), S. 15 (a)—Person taking petroleum in excess quantity unable to prove that he did not continue for a reasonable time to be in possession of entire quantity—Person is guilty under S. 15 (a).

A person who takes delivery of a quantity of petroleum in excess of the quantity allowed by law, and is unable to prove that he did not continue for a reasonable time to be in possession of the entire quantity of which he took delivery, is guilty of the offence of being in possession of petroleum in excess of the quantity allowed by law, within the meaning of S. 15 (a).

[P 196 C 1,2]

*Ram Chand*—for Petitioner.*Mul Chand*—for the Crown.

**Judgment.**—The petitioners, who constitute the firm of Hoshnak Ram Ganga Ram, doing business at Toba Tek Singh, in the District of Lyallpur, have been convicted of having transported and possessed petroleum in contravention of S. 11, Petroleum Act, 8 of 1899. Now, so far as the offence of transporting is concerned, I am of opinion that the conclusion of the lower Courts cannot be upheld.

The material facts are briefly as follows: The Asiatic Petroleum Company of Karachi, which consigned the petroleum have got their agents Mul Chand-Khan Chand at Lyallpur. It appears that the petitioners entered into a contract with the agents at Lyallpur for the purchase of a certain quantity of petroleum, and that, in pursuance of that contract, the agents wrote to the Asiatic Petroleum Company at Karachi to despatch the goods. The latter consequently despatched petroleum and sent the railway receipts to Mul Chand-Khan Chand. It is to be observed that in the railway receipts the Asiatic Petroleum Company are described as the consignors and Mul Chand-Khan Chand as the consignees. So far as these receipts are concerned, the petitioner's names did not originally appear. Upon instructions received from Mul Chand-Khan Chand, the petitioners went to them, paid the money and got the railway receipts endorsed in their favour. They then went to the railway station and took delivery of the goods. Upon these facts I am not prepared to hold that the petitioners can be deemed to have transported petroleum from Karachi to Toba Tek Singh. The word "transport," as defined in S. 2 of the Act, means to remove from one place to another, and I fail to understand how it can be said that the petitioners removed petroleum from Karachi to its destination.

It is perfectly clear that they originally entered into a contract to purchase the goods and that the property therein did not pass until the payment by them of the price to Mul Chand-Khan Chand and the endorsement of the receipts by the latter in their favour. The petroleum was up to that date, the property of the Asiatic Petroleum Company, and the possession was also with them. If they



had refused to deliver the goods to the petitioners, the latter could only claim damages for the breach of an agreement to sell; but they could not say before the aforesaid date that the dominium had passed to them or that the goods were in their possession. Suppose the agents, instead of endorsing the railway receipts had gone to the railway station at Toba Tek Singh and taken delivery of the petroleum from the railway administration, and then handed it over to the petitioners. In that case, I do not think that it could be seriously contended that the petitioners had transported the petroleum. And I do not consider that the fact that the agents endorsed the receipts to the convicts and authorized them to receive the goods makes any real difference in the matter. Mr. Mul Chand for the Crown invites my attention to a judgment of the Madras High Court in *Queen Empress v. Ramanujam* (1), which deals with the offence of transporting opium in contravention of the provisions of the Opium Act, 1 of 1878.

In that case the accused had sent a servant to buy opium from a licensed dealer at a certain place and to bring it to Madras, and the Court rightly held that the act of the servant was the act of the master and consequently convicted the latter of the offence of transporting. I do not think that that judgment has any application to the facts of the present case. Neither the Asiatic Petroleum Company nor their agents, Mul Chand-Khan Chand, can be viewed as the agents of the petitioners. It seems to me that the petitioners were one party to the contract, and the Asiatic Petroleum Company through their agents, were the other party to the contract. I am unable to hold that either the promisor or the promisee can in this case be regarded as the agent of the other. On the question of possession, the matter seems to be simple enough. It is beyond dispute that the petitioners received delivery of 800 gallons of kerosene oil on 9th May 1918, which was in excess of the quantity allowed by law. The evidence adduced by them that they sold 500 gallons to one Ram Chand at the railway station on that day has been disbelieved by the lower Courts, and there is nothing to show that they did not continue for a reasonable time to be in possession of the

entire quantity of the kerosene oil of which they undoubtedly took delivery on the aforesaid date.

They accordingly kept petroleum in excess of the quantity allowed by law, and have been rightly convicted of having been in possession of the entire quantity covered by the third consignment. Mr. Ram Chand for the petitioners places his reliance upon a judgment in *Swaminatha Iyer, In re* (2) but that case is distinguishable on the simple ground that there the person concerned immediately after taking delivery from the railway company distributed the petroleum at the railway premises to certain persons for whom it was intended. The Court accordingly held that he did not "keep" within the meaning of S. 15 (a), Petroleum Act, more than 500 gallons of petroleum for a reasonable time. Here, as stated above, the petitioners have failed to establish that they distributed any petroleum out of 800 gallons which they received on 9th May 1918. Accordingly, I accept the application for revision so far as to set aside the convictions and sentences in respect of the transporting of petroleum. The convictions and sentences in regard to the possession of petroleum are maintained. The fines levied in consequence of the convictions which are hereby set aside must be refunded to the petitioners.

R.M./R.K. *Petition partly accepted.*

(2) [1917] 18 Cr. L. J. 627=39 I. C. 995.

## A. I. R. 1919 Lahore 196

MARTINEAU, J.

*Hardwari Mal and another*—Plaintiffs—Appellants.

v.

*Shambu Nath and another*—Defendants—Respondents.

Second Appeal No. 1224 of 1918, Decided on 28th October 1918, from decree of Dist. Judge, Karnal, D/- 31st January 1918.

Registration Act (16 of 1908), Ss. 47, 73, 74 and 75—Execution of sale deed—Fresh sale deed executed and registered in favour of third person subsequently—Presentation of prior deed for compulsory registration—Execution denied—Enquiry delegated by Registrar to another officer—Registration is not rendered invalid—Prior sale deed though registered subsequently has priority.

A executed a sale-deed of certain land in B's favour on 5th December 1916 but the deed was not registered. On 6th December 1916, A executed another sale-deed of the same land in C's

(1) [1890] 13 Mld. 191.



favour and the deed was followed by registration the same day. A refused to have the sale-deed in B's favour registered. B thereupon applied to the Registrar for compulsory registration under S. 73, Registration Act, who referred the matter for inquiry to the Sub-divisional Officer and on receipt of the latter's report directed the deed to be registered in B's favour under S. 75, Registration Act:

*Held:* (1) that the registration of B's deed was not rendered invalid by reason of the Registrar delegating the holding of the inquiry to another person; (2) that the sale deed in B's favour took effect under S. 47, Registration Act, from the date of its execution and must prevail against the sale-deed in C's favour, notwithstanding the latter's earlier registration. [P 197 C 1, 2]

*Rama Nand*—for Appellants.

*Moti Sagar and Shamir Chand*—for Respondents.

**Judgment.**—Mt. Ilahi Begam sold the land in suit to the plaintiffs for Rs. 250 on 5th December 1916. On the following day she sold it to the defendants for Rs. 300 and the sale-deed being registered the same day, she refused to have the sale-deed in favour of the plaintiffs registered; so they applied for compulsory registration to the Registrar, who after having an inquiry made by the Sub-divisional Officer of Sonapat ordered the deed to be registered, and in pursuance of his order it was registered under S. 75, Registration Act. The plaintiffs sue to establish their right to the land. The first Court passed a decree in their favour, but on appeal the learned District Judge has dismissed the suit, holding that the plaintiffs' deed was not validly registered because the Registrar had no power to order the Sub-divisional officer of Sonapat to make the enquiry prescribed by S. 74, Registration Act, but should have made it himself. The plaintiffs have appealed to this Court. It may be that S. 74 of the Act contemplates an enquiry being made by the Registrar himself, but the ruling relied upon by the lower appellate Court, *Mata Dayal v. Queen-Empress* (1), does not lay down that the registration of the deed would be invalid by reason of the Registrar delegating the holding of the inquiry to another person. That was a criminal case and the question as to the validity of the deed did not arise, the only question being whether an offence had been committed under S. 82.

The lower appellate Court has overlooked S. 85, which lays down that nothing done in good faith pursuant to the

(1) [1897] 24 Cal. 755.

Act by any registering officer shall be deemed invalid merely by reason of any defect in his appointment or procedure. The delegation of the enquiry to the Sub-divisional Officer of Sonapat was purely a defect in procedure. Counsel for the respondent has referred to *Jambu Parshad v. Muhammad Nawab Aftab Ali* (2), but that was a case of a document being presented for registration by an agent who was not authorized by his power-of-attorney to present it, and is not in point. I hold that the registration of the plaintiffs' deed is not rendered invalid by the defect in the procedure followed by the Registrar and therefore that deed operates from 5th December 1916 under S. 47, Registration Act, and has priority over the defendants' deed, which was executed a day later. I accept the appeal, set aside the lower appellate Court's decree, and remand the case to that Court under O. 41, R. 23, Civil P. C., for disposal, after a finding has been given in regard to the 4th ground of the appeal to that Court, which has not yet been dealt with. The stamp on the appeal in this Court will be refunded. Other costs will follow the event. I may note that the learned District Judge's order, expunging for reasons given by him, certain remarks made by the first Court in its judgment will stand.

R.M./R.K.

*Appeal accepted.*

(2) A. I. R. 1914 P. C. 16=37 All. 49=28 I. O. 422=42 I. A. 22 (P. C.).

## A. I. R. 1919 Lahore 197

BROADWAY, J.

*Emperor*

v.

*Budhu Ram*—Accused.

Criminal Revn. No. 826 of 1919, Decided on 13th September 1918, Reported by Dist. Magistrate, Lyallpur, D/- 9th July 1918.

Criminal P. C. (1898), S. 488 (3)—Failure to pay regularly maintenance as per order—Arrears accumulating—Husband sentenced to six months' simple imprisonment, in default of payment—Sentence is justified by terms of S. 488 (3).

Petitioner was ordered to pay maintenance to his wife at the rate of Rs. 4 per mensem. He failed to pay the sum regularly and allowed the arrears to accumulate until they amounted to Rs. 170 odd. In default of payment he was sentenced to six months' simple imprisonment;

*Held:* that the sentence was justified by the terms of section 488 (3). [P 198 C 2]



**Facts.**—The accused Budhu Ram failed to pay maintenance to Mt. Mohri, his wife, fixed by Sardar Charat Singh, Magistrate, First Class, on 2nd May 1899, under S. 488, Criminal P. C. Rs. 170 are still due from him to Mt. Mohri. In default of payment of arrears he was sentenced to six months' simple imprisonment or until payment, if sooner paid, under S. 488 (3), by Ram Chandra, Esquire, Magistrate, First Class, Lyallpur, on 1st July 1918.

**Grounds.**—The petitioner was ordered to pay maintenance by the order of Sardar Charat Singh, Extra Assistant Commissioner, Magistrate, First Class, on 2nd May 1899. Maintenance to one son and one daughter has ceased to be paid for some years and is not now claimed. The wife, Mt. Mohri, however, claims maintenance arrears at Rs. 4 per mensem amounting to Rs. 170-11-0. The details of this balance are given in the order of Mr. Ram Chandra, I. C. S., Magistrate, First Class, dated 4th January 1918. It is not contested that this balance is due or has already been paid. Mr. Ram Chandra, Magistrate, First Class, issued notices. These could not be served. He resorted to proclamation by beat of drum. Budhu Ram petitioner did not appear. Warrants for attachment of his property were issued in order to recover the sum of Rs. 170-11-0 on 4th January 1918. The arrears were not recovered in spite of the issue of successive warrants. Finally Budhu Ram appeared and Mr. Ram Chandra, I. C. S., Magistrate, First Class, tried to get him to come to terms with his wife but failed. Budhu Ram admitted that he had 2 houses in Sayadwala. Though he is old, he has never applied to have the amount of maintenance reduced and the failure to pay appears to have been wilful. On previous occasions he had failed to pay and had paid up eventually on magisterial action being taken. Mr. Ram Chandra, Magistrate, First Class, on 1st July 1918 sentenced Budhu Ram petitioner, in default of payment of arrears of maintenance amounting to Rs. 170, to six months' simple imprisonment or to imprisonment for a term to expire on payment of arrears if the latter date be earlier than six months after 1st July 1918. It is urged before me that the cumulative warrant for the whole arrears and the cumulative sentence of six months is

illegal and I am asked to move the Chief Court to set the order aside. I cannot find that there has been a decision of the Punjab Chief Court on the interpretation of S. 488 (3), Criminal P. C. The rulings of other High and Chief Courts differ. Mr. Ram Chandra's order is correct following *Allapichai Ravuthar v. Mohidin Bibi* (1) and *Bhiku Khan v. Zahuran* (2). It is not correct according to *Queen-Empress v. Narain* (3) and a recent Burma decision dated 8th May 1914. I forward the files for the orders of the Chief Court as to whether the sentence of six months' simple imprisonment under S. 488 (3), Criminal P. C., can stand.

**Order.**—In my view of S. 488 (3), Criminal P. C., the Madras and Calcutta decisions cited in the referring order: *Allapichai Ravuthar v. Mohidin Bibi* (1) and *Bhiku Khan v. Zahuran* (2) lay down the correct interpretation. To the same effect is *Mt. Mano v. Kaka* (4), a decision under S. 536, Act 10 of 1872, which though different in phraseology is to the same effect as S. 488 (3) of the present Act, which is also same in substance as S. 488, Criminal P. C., of 1882. The order of the Magistrate, First Class, is therefore correct. Let the record be returned.

R.M./R.K. *Revision rejected.*

(1) [1897] 20 Mad. 3.

(2) [1898] 25 Cal. 291.

(3) [1887] 9 All. 240=A. W. N. (1887) 54.

(4) [1877] 12 P. R. 1877 Cr.

## A. I. R. 1919 Lahore 198

LEROSSIGNOL, J.

*Fateh Khan*—Plaintiff—Appellant.

v.

*Muhammad Isa*—Defendant—Respondent.

Second Appeal No. 2879 of 1917, Decided on 20th November 1918, from decree of Dist. Judge, Mianwali, D/- 25th June 1917.

(a) Civil P. C. (5 of 1908), O. 6, R. 17—No change in nature of suit—Defendant not prejudiced—Inconvenience healing by award of cost—Amendment should be allowed.

The object of litigation being to ascertain and give effect to the rights of parties, an amendment of the plaint should always be allowed when it does not change the nature of the suit and when the rights of the defendant are in no way prejudiced by the amendment; any inconvenience caused to him can be healed by the award of costs. [P 199 O 1]



(b) Civil P. C. (5 of 1908), O. 2, R. 2 and O. 6, R. 17—O. 2, R. 2, is not applicable to amendment of plaint.

Order 2, R. 2, merely bars a second suit for relief which should have been included in an earlier suit, and does not apply to the case of an amendment of a plaint. [P 199 C 1]

*Nand Lal*—for Appellant.

*Gokal Chand*—for Respondent.

**Judgment.**—The question here is whether the amendment was rightly permitted by the first Court. The District Judge finds that the amendment contravened O. 2, R. 2, and decreed only for the relief first set forth in the plaint. O. 2, R. 2, has nothing to do with the case, but merely bars a second suit for relief which should have been included in an earlier suit. The object of litigation is to ascertain and give effect to the rights of parties and amendment should always be allowed, when it does not change the nature of the suit and when any inconvenience caused to the defendant can be healed by the award of costs. In this case application to amend was made at the first appearance in Court of the defendant and his rights were in no way prejudiced by the amendment. The permission to amend was all the more justified as the plaintiff was a minor suing through a next friend and he would not have been bound by the neglect of the next friend. I accept the appeal and restore the first Court's decree with costs throughout.

R.M./R.K. *Appeal accepted.*

### A. I. R. 1919 Lahore 199

SCOTT-SMITH AND MARTINEAU, JJ.

*Gobindu*—Convict—Appellant.

v.

*Emperor*—Opposite Party.

Criminal Case No. 443 of 1918, Decided on 30th October 1918, from order of Magistrate, 1st Class, Kangra, D/- 12th March 1918.

**Custom (Punjab)—Marriage—Janjharara form is valid among Rathi Rajputs of Kangra.**

Among Rathi Rajputs of the Kangra District a janjharara marriage is valid. [P 200 C 1]

*Mul Chand*—for the Crown.

**Judgment.**—This is an appeal from the order of Lala Diwan Chand, Magistrate of the 1st class in the Kangra District, convicting Gobindu of an offence under S. 498, I. P. C., and sentencing him to undergo six months' rigorous imprisonment and to pay a fine of Rs. 50. The appeal was duly filed in the Court

of the Sessions Judge, Hoshiarpur, and on his recommendation it was transferred for hearing before this Court, because an important question arises, namely, whether remarriage of a widow by the janjharara ceremony is valid by custom in the tribe to which the parties belong. In *Gigal v. Phio* (1) this Court refused upon revision to interfere with the finding of the District Magistrate of Kangra to the effect that the janjharara ceremony of marriage did not by custom constitute a valid marriage within the meaning of S. 494, I. P. C. The learned Judges, who were parties to that decision, said that the District Magistrate had given good reasons for his finding and that they were not prepared to interfere with his order, and consequently refused the petition for revision. They did not go into the matter in detail and we therefore consider that we are not bound by that decision in deciding the present appeal.

The case for the prosecution is that Lehn, complainant, married Mt. Gulabi, a widow, by the janjharara ceremony on 14th February 1917 and that some four months later Gobindu appellant enticed her away within the meaning of S. 498, I. P. C. The parties are Rajputs belonging to the class known as Rathis. The questions for decision are: (1) Is the janjharara form of marriage valid among Rathis? (2) Was Mt. Gulabi married to Lehn by janjharara ceremony? (3) Was she abducted by Gobindu? (4) Did Gobindu know that she was the wife of Lehn? In regard to the first point Mr. Lyall in his settlement report of the Kangra district at p. 102 gives two classes of landholders: (1) those whose women affect seclusion and do not work in the fields, and who cannot contract what are known as janjharara or widow marriages, and (2) those who marry widows, and allow their women to work more or less in the fields. It appears from this that the higher classes do not allow janjharara marriages, but the lower classes do allow them. The Gazetteer of the Kangra district published in 1904 pp. 74 and 75, divides the Rajputs into five classes. The two lowest of these are the Rathis, of whom it is said that they appear to be degenerate Rajputs and that if they are to be definitely classified, they should be classed as Sudras. In

(1) [1888] 25 P. R. 1838 Cr.



*Mt. Deokie v. Ram Dhan* (2) it was found that, whilst a janjharara marriage was not recognized as valid amongst the highest class of pure Rajputs, it was recognized as valid amongst the lower or impure sub-divisions, such as the Sartoras, the sub-division to which the parties to that suit belonged. The riwaj-iam of the neighbouring Tahsil of Dehra, which was recently prepared, states that janjharara marriages are recognized as valid among the Rathis. It is therefore in our opinion *prima facie* probable that such a marriage is valid amongst Rathis in the Kangra district and that if Lehnu married Mt. Gulabi by janjharara ceremony, the marriage would be valid.

Now the Magistrate in this case held a special inquiry as to whether such marriages were valid or not, and in his opinion, the inquiry shows that such marriages are valid. Unfortunately neither the appellant nor his counsel has appeared to argue the appeal before us, but we have carefully examined the evidence on the record and we agree with the Magistrate that a janjharara marriage amongst the Rathis is valid. As to the second question there is very strong evidence on the record to show that Lehnu married Mt. Gulabi by janjharara and that all the necessary ceremonies were carried out at the time. The woman's own statement that no marriage was performed is absolutely valueless in view of her statement at mutation, her report at the thana and her execution of the document of 16th February 1917. Her explanation as to why she went and resided in Lehnu's house has been shown by the Magistrate to be absolutely false and it is unnecessary to discuss the matter further. The next question is whether Gobindu abducted her and on this we have the direct evidence of Kirla, prosecution witness. His name was mentioned in the original report at the thana made by Lehnu immediately after the abduction. The Magistrate has believed his evidence and we see no reason to disbelieve it. In addition to this, there is the evidence detailed in the Magistrate's judgment as to Mt. Gulabi living in the appellant's house. The remaining point is whether the appellant knew of the marriage. In regard to this, it has to be considered that he has known the woman for some years and

(2) [1890] 98 P. R. 1890.

lived near her, and we think that the Magistrate was justified in presuming knowledge on his part. Kirla's evidence shows that the appellant was the actual abductor and we have no doubt that he abducted her from Lehnu's house and that he very well knew that she was Lehnu's wife. We therefore dismiss the appeal and confirm the finding and sentence. The appellant, who is at present on bail, should return to jail and complete his sentence.

R.M./R.K.

*Appeal dismissed.*

### A. I. R. 1919 Lahore 200

SHADI LAL AND WILBERFORCE, JJ.

*Bhawanishankar*—Plaintiff—Appellant.

v.

*Industrial Bank of India, Ltd., Ludhiana* and another—Defendant—Respondents.

First Appeal No. 520 of 1917, Decided on 4th December 1918, from decree of Senior Sub-Judge, Ludhiana, D/- 29th May 1916.

(a) Companies Act (1882), S. 136—Suit by unsuccessful claimant of attached property against Company in liquidation cannot be commenced without obtaining leave required by S. 136.

A regular civil suit brought by an unsuccessful claimant of attached property against a company in liquidation is not a part of the proceeding taken by the Court of execution in respect of the objection preferred by him and therefore it cannot be commenced without obtaining the leave of the Liquidation Judge as required by S. 136, 47 I. C. 392 and A. I. R. 1915 Mad. 495, Dist. [P 201 C 1]

(b) Limitation Act (1908), S. 5—Defendant not objecting to fixing valuation of suit below Rs. 5000—Plaintiff is justified in instituting appeal in District Court—Appeal returned for presentation to Chief Court on ground that valuation is above Rs. 5000—Time spent in prosecuting infructuous appeal can be deducted from period of limitation for appeal.

When the valuation of a suit is fixed in the plaint below Rs. 5,000 and no objection is made to it by the defendant, the plaintiff is justified in instituting his appeal in the District Court; and if the appeal is afterwards returned to be presented to the Chief Court, on the ground that the valuation in reality is Rs. 5,000 or above the time spent in prosecuting the infructuous appeal should be deducted in computing the period of limitation prescribed for an appeal to the Chief Court. [P 201 C 2]

*Hukam Chand and Jagan Nath*—for Appellant.

*Narinjan Pershad*—for Respondents.

**Judgment.**—The Liquidator of the Industrial Bank of India, Limited, which



is now being wound up by the Court, attached the house in dispute in execution of a decree against one Kamta Parshed. The plaintiff Bhawani Shankar preferred an objection to the attachment on the ground that the house belonged to him. His claim was rejected by the Court of execution, and he thereupon instituted the usual declaratory suit which has been dismissed by the Subordinate Judge. This appeal has been preferred against the judgment of the Subordinate Judge, and two preliminary objections have been taken to the hearing of the appeal. (1) That the appeal cannot be entertained without the leave of the Court conducting the liquidation, as required by S. 136, Companies Act, 6 of 1882. (2) That the appeal is barred by time. The first objection is in our opinion well founded and must be upheld. S. 136 of the aforesaid Act provides that when a winding up order has been made, no suit or other legal proceeding shall be proceeded with or commenced against the Company except by leave of the Court, and subject to such terms as the Court may impose.

Now it is admitted that the leave of the Liquidation Court was not obtained either for the purpose of instituting the suit or for preferring this appeal. Mr. Jagan Nath for the appellant however argues that the suit should be treated as a continuation of the execution proceedings; and that as his client was conducting practically a defensive proceeding in the Court of execution, he should be deemed to be a defendant within the purview of the Full Bench judgment of this Court [*Kishen Singh v. Industrial Bank of India* (1)] and is therefore not required to obtain leave for any defensive proceeding on his behalf. In support of his contention that the suit under O. 21, R. 63, Civil P. C., is a mere continuation of the proceedings on a claim petition, he places his reliance upon the judgment in *Krishnappa Chetty v. Abdul Khader Saheb* (2), which no doubt lays down that all alienations during the continuance of the proceeding originated by the claim petition till the disposal of the suit brought under O. 21, R. 63, to set aside the order passed on the claim petition are affected by the doctrine of

*lis pendens*. Now that may be sound law so far as the doctrine of *lis pendens* is concerned; but in view of the wording of S. 136, Companies Act, we are not prepared to hold that a regular suit brought by an unsuccessful claimant is a part of the proceeding taken by the Court of execution in respect of an objection preferred by him. It will be observed that the language of the section draws a distinction between suit and proceeding; and it has been held by the Bombay High Court in *Ishvardas Jagjivandas v. Dhanjisha Nasarvanji* (3), that proceedings in execution are regarded as distinct from the suit for the purposes of this section, and that the permission given to proceed with a suit is no authority for commencing proceedings in execution of the decree passed in that suit. We must therefore hold that the suit instituted by the plaintiff cannot be viewed as a part of the execution proceedings, and that he could not commence either the suit or the appeal without obtaining the leave of the Court conducting the liquidation. As regards the second objection, we are of opinion that sufficient cause has been shown for presenting the appeal after the prescribed period. It appears from the plaint that the value of the suit was assessed by the plaintiff at Rs. 4,500, and that no objection was taken by the defendant to that valuation. In these circumstances the plaintiff was justified in instituting his appeal in the District Court, and after excluding the time spent in prosecuting the infructuous appeal, the appeal presented to this Court is within time. In view of our decision on the first objection, we dismiss the appeal with costs.

R.M./R.K. *Appeal dismissed.*

(3) [1892] 16 Bom. 644.

### A. I. R. 1919 Lahore 201

CHEVIS, J.

*Gobind Ram*--Defendant--Appellant.  
v.

*Mt. Pali and others*--Plaintiffs--Respondents.

Second Appeal No. 1719 of 1918, Decided on 10th February 1919, from decree of Dist. Judge, Hoshiarpur, D/- 1st February 1918.

Civil P. C. (5 of 1908), O. 41, R. 33 — Appellate Court cannot set aside decree which has not been appealed against.

A Court cannot in the course of the decision of an appeal from one decree set aside a decree

(1) (1918) 62 P. R. 1918=47 I. O. 392.

(2) A. I. R. 1915 Mad. 495=38 Mad. 585=25 I. O. 11.



which dismisses a separate suit and has not been appealed against. [P 202 C 2]

*P.* sued *G.* to recover possession of certain land previously sold by her to the defendant alleging fraud and undue influence. With regard to the same sale three other suits were also brought one by a collateral of the last male holder for a declaration to protect her reversionary rights and two by rival pre-emptors. The first Court gave *P.* a decree and dismissed the other three suits. *G.* appealed, while the plaintiffs in the other suits did not prefer any appeal. In the course of the appeal *P.* and *G.* put in a compromise, according to which *G.* was to obtain half the land on payment of a certain sum of money. Thereupon the District Judge added the plaintiffs in the other three suits and ordered that those suits be re-opened and re-tried. *G.* preferred a second appeal:

*Held:* that the order of the District Judge was incorrect and that the suits could not be re-opened. [P 202 C 2]

*Fakir Chand*—for Appellant.

*Jagan Nath* and *Behari Lal*—for Respondents.

**Judgment**—*Mt. Pali*, widow of *Mutsaddi*, sold the land in suit to *Gobind Ram* on 14th May 1915 for Rs. 1,990. Four suits were subsequently brought (1) by *Mt. Pali*, who sued to recover possession, alleging fraud and undue influence; (2) by *Mt. Surasti*, daughter of a collateral of *Mutsaddi*, who sued for a declaration to protect her reversionary rights, alleging want of consideration and necessity; (3) by *Asa Ram*, who sued to pre-empt; and (4) by *Durga* and *Dheru*, who also sued to pre-empt. The first Court gave *Mt. Pali* a decree and dismissed the other three suits. The plaintiffs who were unsuccessful in the first Court did not appeal and so the decrees dismissing their suits became final. Against the decree obtained by *Mt. Pali* *Gobind Ram* preferred an appeal to the District Judge. Then *Gobind Ram* and *Mt. Pali* put in a compromise, according to which *Gobind Ram* was to pay *Mt. Pali* Rs. 1,990 and take half the land. On this the learned District Judge remarked that as the other plaintiffs had had their suits dismissed merely because *Mt. Pali* had been given a decree, their cases should be re-opened now that *Mt. Pali* had compromised with *Gobind Ram*. He accordingly added them as parties to the appeal brought by *Gobind Ram* and then, passing a decree as between *Mt. Pali* and *Gobind Ram* in the terms of the compromise, ordered that the three suits brought by *Mt. Surasti*, *Asa Ram*, *Durga* and *Dheru* should be re-opened and re-tried by the lower Court, these plaintiffs being allowed to amend

their complaints so as to meet the new circumstances introduced by the compromise. *Gobind Ram* appeals.

I think the course adopted by the learned District Judge is quite incorrect. Had *Gobind Ram's* appeal succeeded on the merits, I do not see that this would have been any good ground for re-opening the other three suits. *Mt. Surasti*, *Asa Ram* and *Durga* must have been aware that it was open to *Gobind Ram* to appeal against the decree obtained by *Mt. Pali* and that that decree might be reversed or modified by the appellate Court. Therefore, if they wished to be on the safe side, they should have appealed merely as a matter of precaution. I am unaware of any provision of law which enables a Court in the course of the decision of an appeal from one decree to set aside the decree which dismisses a separate suit and which has not been appealed against. If *Mt. Surasti*, *Asa Ram* and *Durga* have any remedy now open to them, I think it must be by way of fresh separate suits, though I cannot of course, attempt to offer any opinion as to whether any fresh suits will lie. The learned District Judge says in his order:

"The compromise read with the original sale deed will be regarded as a new contract between *Mt. Pali* and *Gobind Ram*."

As to this I can only say that it would be premature at this stage to decide any issue likely to arise in any future suits which may or may not be brought. I accept this appeal and while upholding the decree of the lower Appellate Court passed in terms of the compromise between *Mt. Pali* and *Gobind Ram*, I reverse so much of the learned District Judge's order as re-opens the three suits in which *Mt. Surasti*, *Asa Ram* and *Durga* and *Dheru* were plaintiffs. The order of the first Court dismissing these three suits will stand. The circumstances are peculiar and I pass no order as to costs in this Court. *Mt. Surasti*, *Asa Ram* and *Durga* and *Dheru* will bear their own costs in the District Judge's Court, and as ordered by the first Court, they will also bear their own costs in that Court.

R.M./R.K.

*Appeal accepted.*



**A. I. R. 1919 Lahore 203**

PETMAN, J.

*Attar Singh*—Plaintiff—Appellant.

v.

*Karm Chand and others* — Defendants — Respondents.

Misc. Second Appeal No. 344 of 1919, Decided on 16th May 1919, from order of Dist. Judge, Jullundur, D/- 22nd November 1918.

(a) Civil P. C. (5 of 1908), O. 41, R. 18—Order under R. 18 is not appealable.

No appeal lies against an order passed under O. 41, R. 18. [P 203 C 1]

(b) Civil P. C. (5 of 1908), S. 115 and O. 41, R. 18—Date for paying process fee must be fixed to apply R. 18—Appellant directed to pay fees when date of hearing was fixed—No fees paid—Appeal dismissed—No appeal lies—As ground that no time to pay fee was fixed was taken order held could not be interfered in revision.

In order to be able to avail itself of the provisions of O. 41, R. 18, it is the duty of the appellate Court to fix a date by which the process-fees are to be paid. [P 203 C 2]

The appellant filed an appeal in the Court of the District Judge and was ordered at the time the date of the hearing was fixed, to pay the amount of the process-fee which not having been paid even on the date of the hearing, the appeal was dismissed. He appealed to the High Court;

*Held:* (1) that no appeal lay. [P 203 C 2]

(2) that inasmuch as the appellant had not pleaded that the non-payment was due to the fact that he had not been directed to pay by any fixed date, this was not a fit case for the exercise of the discretionary powers of revision.

[P 203 C 2, P 204 C 1]

*Gopal Lal*—for Appellant.

*Kanwar Narain*—for Respondents.

**Judgment.**—The appellant had instituted an appeal in the Court of the District Judge at Jullundur, and though a very long period was given for the hearing of the case, he paid no process-fees to have notice served on the respondents. On the date fixed for the hearing the appeal was dismissed on account of the said default, presumably under O. 41, R. 18, Civil P. C. The appellant made no application under R. 19 of the same order and has appealed to this Court. A preliminary objection is taken that no appeal lies. Though this appeal purports to be one under O. 43, Cl. (t), which relates to an order passed under O. 41, R. 19, it is clear that no order was passed under that rule and the appeal is really one against an order passed under R. 19. The proper remedy was an application under R. 19, but this was not made. No appeal lies to this Court from an order under R. 18 and it is admitted that the order

is not a decree. I therefore held that no appeal lies, but I proceed to hear the case on revision.

The usual practice in the subordinate Courts is for the Clerk of the Court to give a date by which the process-fees for serving the respondent with notice of the appeal is to be paid into Court. Such action by a ministerial officer of the Court is authorised in this respect and must be regarded as an act of the Court. In the present case the appellant was directed to pay in the amount of the process-fee but no date was fixed by which the appellant had to make the payment. O. 41, R. 18, provides that the Court may dismiss an appeal when on the date fixed for the hearing it is found that the notice to the respondent has not been served in consequence of the failure of the appellant to deposit within the period fixed, the sum required to defray the cost of serving the notice. In order to enable the appellate Court to avail itself of this provision a date must have been fixed by which the process-fee was to be paid. This was the view taken of the law in *Purshadee Lall v. Umbika Pershad Lal* (1). Though this decision was not given under the present Code of Civil Procedure, the law on the subject has not been altered. In fact a reference to the previous Codes makes it more clear that it is the duty of the appellate Court to fix a date by which the process-fees are to be paid. S. 2, Act 23 of 1861, is as follows:

"Every process required to be issued under Act 8 of 1859 shall be served at the expense of . . . . and the sum required to defray the costs of such service shall be paid into the Court before the process is issued within a period to be fixed by the Court issuing the process."

The alteration in the language of the subsequent Codes has not altered the meaning. In the present case the appellant was ordered at the time the date of the hearing was fixed to pay the amount of the process-fee. He certainly realised that he had to pay the fee before the date of hearing. The most that he can claim is that he was allowed time up to the date of hearing. Even on the date of hearing the process fee had not been paid and he did not plead that the non-payment was due to the fact that he had not been directed to pay by any fixed period. It may be contended that he was given the whole period. However

(1) [1869] 11 W. R. 290=3 B.L. R. App 25.



that may be this is not in my opinion a fit case for the exercise of the discretionary powers of revision of this Court. The appeal is dismissed with costs.

R.M./R.K.

*Appeal dismissed.*

### A. I. R. 1919 Lahore 204

SHADI LAL AND LEROSSIGNOL, JJ.

*Bhana Mal*—Accused—Applicant.

v.

*Emperor*—Opposite Party.

Criminal Revn. No. 140 of 1918, Decided on 9th August 1918, reported by Ss. Judge, Jhelum, D/- 24th January 1918.

**Public Gambling Act (1867), Ss. 3 and 4—Offences under Ss. 3 and 4—Keepers and gamblers can be tried in same trial—Criminal P. C. (1898), S. 239.**

When a gambling den is raided and some persons are found gambling therein in the presence of the owner or occupier of the house in which gaming is going on the offence of the keeper is so intimately connected with that of the players that the two must be regarded as part and parcel of the same transaction. Such cases are within the 'purview' of S. 239, and all the offenders, whether keepers or gamblers, can be proceeded against in the same trial. [P 204 C 2]

*Amar Nath Chona*—for Accused.

*Santanam*—for the Crown.

**Facts**—M. Shah Nawaz Khan, Sub-Inspector, City Police, Jhelum, received information that Bhana Mal, accused 1, is using his house as a public gambling house. Thereupon the said Sub-Inspector, after procuring a warrant according to law from Sardar Hukam Singh, Magistrate, 1st Class, came across the house of the said accused by sunrise on 21st October 1917. As at the time 13 other persons besides Bhana accused were engaged in gambling, therefore all 14 persons were challaned under Ss. 3 and 4 Gambling Act. The accused on conviction by Fakir Sayad Jalal-ud-din, exercising the powers of a Magistrate of the 1st Class in the Jhelum District, was sentenced, by order dated 14th January 1918, under S. 3, Gambling Act, to 20 days rigorous imprisonment.

**Grounds.**—Bhana Mal, applicant, has been tried along with several other persons, he himself for keeping a public gaming house, and the others for gambling. Bhana Mal has been convicted under S. 3, Gambling Act and sentenced to 20 days' rigorous imprisonment and several other persons have been convicted of gambling under S. 4 and fined Rs. 10 apiece. Bhana Mal applies for revision on the ground that the joint trial of the persons accused

under Ss. 3 and 4, Gambling Act is illegal. There is no doubt that under the authority of *Emperor v. Fazal Din* (1) the contention is correct, and in that case, which was precisely on all fours, the trial was set aside and separate re-trials were ordered. Although the case is a petty one, at all events, as regards the applicant Bhana, I have no option under the above-mentioned ruling but to report the case. It may be that Bhana will be no better off than before, but the motive for the application appears to be that several marriages are coming off and being a halvai he expects that his services will be in considerable request, and that the profits will correspond. He is, it would seem, entitled in law to retrial and the case is therefore reported.

**Judgment.**—In this case 12 persons have been tried together and convicted under the Gambling Act, 3 of 1867, the petitioner Bhana Mal under S. 3 for keeping a common gaming house, and the remaining 11 under S. 4 for gambling in that house. The question for determination is whether the joint trial was illegal, and must therefore be set aside. It is clear that the only provision of the law dealing with the matter is that contained in S. 239, Criminal P. C., which allows the Court to hold a joint trial of more persons than one, provided they are accused of the same offence, or of different offences committed in the same transaction. Now, the offence with which Bhana Mal was charged is different from that for which his co-accused were prosecuted, but we think that both the offences were committed in the same transaction. A Single Bench judgment in *Emperor v. Fazal Din* (1) by the Hon'ble Sir Donald Johnstone, which follows a previous ruling by the same learned Judge in *Miscellaneous Petition No. 53 of 1909 Makhan v. Emperor* (2), lays down the rule that the above offences do not constitute the same transaction, but with all due deference we are unable to concur in that view. It seems to us that when a gambling den is raided and some persons are found gambling therein in the presence of the owner or occupier of the house in which gaming is going on the offence of the keeper is so intimately connected with that of the players that the two

(1) A. I. R. 1914 Lah. 566=27 I. O. 844=16 Cr. L. J. 220=35 P. R. 1914 Cr.

(2) [1910] 11 Cr. L. J. 211=5 I. O. 720.



must be regarded as part and parcel of the same transaction.

A perusal of S. 4, Gambling Act, makes it absolutely clear that the players are liable only because they are found in a common gaming house for the purpose of gaming, which gaming house has been placed at their disposal by the owner or occupier in lieu of a fee charged by him either for the use of the house or of the instruments of gaming. The keeper is to all intents and purposes an abettor of the offence committed by the players, though the statute punishes the former under a different section and thereby makes his act a separate offence. The cases under the Gambling Act, which ordinarily come before a Court of Justice, are those in which the keeper and the players are proceeded against on the strength of facts relating to gambling on a particular occasion. It is conceivable that the keeper may be charged with keeping a common gaming house on an occasion with which the players have no concern whatever. In that case the two offences would probably not constitute the same transaction, and the joint trial would be bad. But such cases are few and far between, and as stated above, in the large majority of cases both the keeper and the players are arraigned upon the basis of the acts done upon one and the same occasion. These cases are in our opinion within the purview of S. 239, Criminal P. C., and all the offenders, whether keepers or gamblers, can be proceeded against in the same trial. This view coincides with that taken by the Judicial Commissioner, Nagpur, in *Sheikh Moti v. Emperor* (3).

We accordingly hold that the trial is not open to any valid objection, and upon the merits we find no adequate ground which would warrant our interference. It however appears that the learned Sessions Judge has released the petitioner Bhana Mal on bail and we therefore reduce the sentence of imprisonment to the period already undergone. In all other respects the application for revision is rejected.

R.M./R.K.

*Sentence reduced.*

(3) [1918] 14 Cr. L. J. 298=19 I. O. 1949=9 N. L. R. 68.

## A. I. R. 1919 Lahore 205

BROADWAY, J.

*Emperor*

v.

*Budha—Accused.*

Criminal Revn. No. 883 of 1918, Decided on 7th September 1918, case reported by Dist. Magistrate Gurdaspur.

Criminal P. C. (1898), S. 439—Sentence not illegal—Sentence should not be enhanced.

Where a sentence passed by a Magistrate is not illegal, the mere fact that the High Court might have passed a heavier sentence is not of itself a sufficient reason to enhance the punishment inflicted, in the exercise of its revisional powers.

[P 206 C 1]

**Facts.**—In this case accused has been chalaned under S. 379 for stealing currency notes worth Rs. 1,192 which the complainant and his companions, all of whom are lambardars, had taken to Tahsil Batala for payment of the land revenue. The accused, who is also a lambardar, had gone there for the same purpose. As there was a great rush of people in the tahsil on the occasion, the accused contrived to steal the notes in question which the complainant was then holding in his hand. The accused was caught at the very moment and chalaned. The Magistrate fined him Rs. 200 only. The accused, on conviction by Lala Dwarka Nath, exercising the powers of a Magistrate of the First Class in the Gurdaspur District, was sentenced, by order dated 13th June 1918, under S. 379, I. P. C., to Rs. 200 as fine, in default one year's rigorous imprisonment.

**Grounds.**—Budha, lambardar of Sarwali, Tahsil Batala, has, on 13th June 1918, been convicted of theft of Rs. 1,192 in notes from a lambardar in the tahsil compound at Batala. He confessed and was let off with a fine of Rs. 200. The Court remarked he was young, but I see he is aged 35. The sentence is, I think, most inadequate and I forward the record to the Chief Court with the view of its enhancement.

**Order.**—There is of course no doubt as to the guilt of this lambardar Budha. The law however allows a discretion to the Courts as to the sentence to be passed and it is therefore almost impossible to affirm on any sentence passed that that sentence alone is appropriate. This is a revision and it is not necessary for me to interfere even if the Court had com-



mitted an illegality: vide *Ala Dya v. Emperor* (1). The principles upon which this Court acts as a Court of revision in relation to the enhancement of sentences are enunciated in *Empress v. Chuni Lal* (2): see also *Abdul v. Emperor* (3) and *Emperor v. Hari Singh* (4). In the present case the sentence is not illegal. The fact that I myself might have passed a heavier sentence is not of itself a sufficient reason to enhance the punishment inflicted. The lambardar appears to have yielded to a sudden temptation and as he will no doubt be removed from his lambardarship (if he has not been removed already), I do not think it necessary to take any further action and I am therefore unable to accept the recommendation of the learned District Magistrate.

R.M./R.K. Revision rejected.

(1) [1907] 5 P. R. 1906 Cr.=4 Cr. L. J. 75.

(2) [1889] 7 P. R. 1889 Cr.

(3) [1910] 11 Cr. L. J. 389=6 I. C. 639.

(4) [1913] 14 Cr. L. J. 599=21 I. C. 471.

## A. I. R. 1919 Lahore 206

RATTIGAN, C. J.

*Kanshi Ram*—Appellant.

v.

*Rao Baldeo Singh and another*—Respondents.

Civil Appeal No. 3055 of 1918, Decided on 26th March 1919, from decree of Senior Sub-Judge, 1st Class, Ambala, D/- 29th July 1918.

Civil P. C. (5 of 1908), O. 23, R. 1—Withdrawal of suit without leave to bring first suit—Subsequent suit based on different allegations is not maintainable.

Plaintiff brought a suit against C and T to recover possession of a house, on the allegation that it had been let to C who had abandoned it and that T was in possession of it as a trespasser. The defendants pleaded that they were the owners of the house. The plaintiff obtained permission to withdraw the suit but he was not given leave to bring a fresh suit. Subsequently he brought another suit for possession of the same house against T and K, on the ground that after the withdrawal of the first suit he had let the house to T who had abandoned it and had sold it to K.

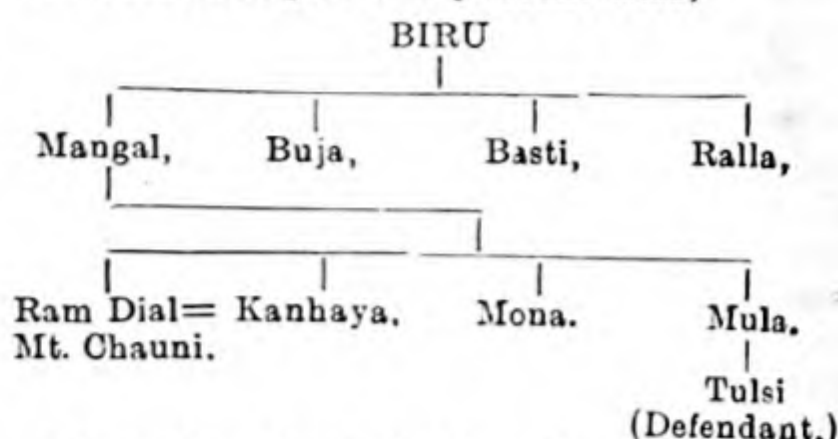
Held: that the previous suit having been withdrawn without leave to bring a fresh suit, the plaintiff was debarred under the provisions of O. 23, R. (1) from alleging that T was not the owner of the house, and that therefore the present suit was not maintainable. [P 207 C 1]

*Nanak Chand*—for Appellant.

*Sewaram Singh*—for Respondents.

**Judgment.**—The following pedigree-table relating to the family of the defend-

dant Tulsi will help towards a proper understanding of the present case;



Plaintiff, Rai Baldeo Singh, who is the proprietor of the village of Raipur in the Ambala District, sues, through the Court of Wards as his next friend, for a declaration to the effect that he is the owner of a certain house in the village abadi: that the said house was leased by him some 19 years before suit to Tulsi defendant 2, for residential purposes; that about a year thereafter Tulsi left the house in the village; that on 10th March 1916 Tulsi sold the house to Kanshi Ram, defendant 1; that he was not competent to sell it; and that the sale is not binding upon the plaintiff. Kanshi Ram and Tulsi denied plaintiff's title as owner and pleaded that Tulsi was himself the absolute owner of the house and that the sale was valid and binding. The Munsif found that plaintiff had failed to prove his title to the house and that he had not established his allegation that he had leased it to Tulsi. The Senior Subordinate Judge, after remanding the case for an inquiry on certain points, reversed the decree of the first Court and found that Tulsi had by reason of abandonment lost all rights in the house and that plaintiff as the owner of the village was presumably in possession of the site in question and was therefore entitled to the declaration prayed for. Kanshi Ram has preferred a second appeal to this Court and the various points involved have been argued at some length before me.

It appears that in 1896 the present plaintiff brought a suit for possession of the same house, based on very similar allegations, against Mt. Chauni the widow of Ram Dial and Tulsi, and that in that suit he claimed that he was the owner of the house; that he had leased it to Mangal, the father-in-law of Mt. Chauni; that Mt. Chauni after the death of her husband had left the house in the village and had thereby lost all rights in the



property and that he was consequently entitled to a decree for possession. Mt. Chauni and Tulsi pleaded that the plaintiff was not the owner of the house but that on the contrary they and their ancestors had for a long time past been in proprietary and adverse possession of it and that plaintiff had no right to claim possession. Plaintiff did not proceed with the suit but asked permission to withdraw his claim. This permission was granted but the Court did not, at the time of passing this order, give plaintiff leave to institute a subsequent suit in respect of the same subject-matter. It has been argued before me that O. 23, R. 1, Civil P. C., precludes plaintiff from suing now for the declaration claimed by him inasmuch as the allegations in the plaint relate to the same cause of action which he put forward in the previous suit. In answer Mr. Sewaram Singh contends that the present suit is based upon an entirely different cause of action inasmuch as the plaintiff alleges that on a date subsequent to the previous suit the plaintiff leased the house to Tulsi and that Tulsi thereafter abandoned it. I have considered these arguments and my conclusion is that O. 23, R. 1, debars plaintiff from alleging against Tulsi any claim founded upon his alleged ownership of the property.

The withdrawal of the suit in 1896 must be regarded as a bar to any plea by the plaintiff that Tulsi was not an absolute owner of the house and site in dispute. In the previous case Tulsi in express terms claimed to be the absolute owner, and in view of the result of that case plaintiff must now concede that at that time at all events Tulsi was such absolute owner. It is impossible for plaintiff therefore in the present suit to claim that he was the owner of the property in 1898 or 1899 and that Tulsi was merely a tenant holding under him. His whole suit as at present framed, is based on the assumption that he is as much the owner of the site of the house in question as he is of the rest of the village abadi, and in my opinion this is a position that he is not entitled to take up. Of course there is nothing to debar plaintiff from proving that subsequent to the previous suit Tulsi abandoned the house and that he (plaintiff) thereupon took possession of it and has acquired proprietary right therein by adverse

possession for more than 12 years. But it is not upon this allegation that his claim is based and there is no evidence to prove that he has actually had such adverse possession in respect of the house. The first Court, for reasons which appear to me sound, came to the conclusion that plaintiff had failed to prove that he had been in possession at all, and this is practically the same conclusion that was arrived at by another Munsif after the remand ordered by the Subordinate Judge. The latter does not find that plaintiff has in fact been in possession of the house or of the site, but concludes that he must be presumed to have been in possession because he is the owner of the site. Obviously upon the view that I take, this presumption cannot arise as it is not open to the plaintiff to claim, as against Tulsi, that he as the proprietor of the village is also the proprietor of the site of this particular house. In my opinion the first Court was right in dismissing the suit and I accordingly accept the appeal and set aside the order and decree of the Senior Subordinate Judge. Plaintiff must pay costs throughout.

R.M./R.K.

*Appeal accepted.*

### A. I. R. 1919 Lahore 207

SHADI LAL AND MARTINEAU, JJ.

*Mt. Ishri and another*—Defendants—Appellants.

v.

*Bhola Singh and others*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 460 of 1916, Decided on 29th May 1919, from decree of District Judge, Jullundur, D/- 15th December 1915.

Custom (Punjab)—Succession—Jats of Jullundur District—Daughter not preferred to collaterals of 5th degree—Gift to daughter by widow is invalid in presence of such collaterals.

Among Jats of the Jullundur District a daughter is not entitled to succeed as against collaterals of the 5th degree, and a gift of ancestral property by the widow of the last male owner to her daughter in the presence of such collaterals is invalid. [P 208 C 1]

*Mehr Chand Mahajan*—for Appellants.

*Fakir Chand*—for Respondents.

**Judgment.**—The plaintiffs, who are Jats of the Jullundur District, sue in this case for a declaration that a gift of land and a house made by Ishri, widow of their collateral Gurmukh Singh, to Aohhro, her daughter by her first hus.



band Sarmukh Singh, shall not affect their reversionary rights. Sarmukh Singh and Gurmukh Singh were brothers and the plaintiffs are their collaterals in the fifth degree. The lower Courts have concurred in giving the plaintiffs a decree, holding the gift to be invalid. The defendants have appealed to this Court, having obtained a certificate from the District Judge. It is contended on their behalf that the land is not shown to be ancestral, being entered in the name of Gurmukh Singh's father Kharku in the earliest settlement. But both the Courts below have agreed in finding that the land is ancestral, and the finding is justified by the entries in the settlement record. In the pedigree-table the names of the common ancestor and his ancestors as far back as Garab appear, and in the history of the village it is stated that Garab was the founder of the village. The presumption in these circumstances is that the land is ancestral.

As niece of the last male owner Ach-hro would clearly have no case at all, and even as the daughter of the former Sarmukh Singh, she has to show that she is entitled to succeed to ancestral property in the presence of collaterals of the 5th degree (the provisions of the *Riwaj-i-am* being against the daughter) or that a gift of property to her by her mother is valid. The evidence however does not contain a single instance in her favour, and we agree therefore with the findings of the lower Courts that the gift is invalid, and dismiss the appeal with costs.

R.M./R.K.

*Appeal dismissed.***A. I. R. 1919 Lahore 208**

CHEVIS AND BROADWAY, JJ.

*Kanhaiya Lal* — Defendant — Appellant.

v.

*Khairati Lal*—Plaintiff—Respondent.  
Civil Appln. No. 107 of 1914, Decided on 6th January 1919.**Arbitration—Duty of arbitrator—Arbitrator must come to decision on evidence taken in presence of parties—Making private inquiries vitiates award — Civil P. C. (1908), Sch. 2, para. 15.**

An arbitrator must come to his decision on evidence taken in the presence of both parties or after having given both parties an opportunity of being present at the inquiry, and the making of private inquiries vitiates the award.

Where therefore an arbitrator made private inquiries from some person or persons unknown:

*Held:* that the making of private inquiries amounted to legal misconduct and was sufficient to vitiate the award. [P 209 C1]

*Muhammad Shafi* and *Moti Sagar*—for Appellant.

*Santanam* and *Balwant Rai*—for Respondent.

**Judgment.**—One Khairati Lal instituted a suit in forma pauperis against Kanhaiya Lal and Mani Ram for possession by partition of a 1/3rd share in certain properties. Kanhaiya Lal was the principal contesting defendant. Khairati Lal succeeded in getting a decree and Kanhaiya Lal preferred an appeal to this Court. Before the appeal came up for hearing however Khairati Lal and Kanhaiya Lal filed a joint application through Mr. Ram Kanwar, Pleader, asking for an order of reference to arbitration. The arbitrator appointed was Babu Har Bakhsh, father-in-law of Kanhaiya Lal. This application was filed on 6th July 1914 and was sent down for verification by an order of Scott-Smith, J., on 8th July 1914. After verification a formal order of reference was passed by a Division Bench of this Court on 15th October 1914: see pp. 2 and 3 of printed book.

The arbitrator having filed his award Khairati Lal lodged objections to it whereupon a Division Bench of this Court by an order, dated 28th March 1917, sent the case to the District Judge at Delhi directing him to hold the necessary inquiry into the objections taking such evidence as might be produced by the parties and to submit the same to this Court with his own opinion (p. 89 printed book). The District Judge having complied with this order has submitted the case to this Court with his opinion which is to be found at pp. 98, 99 and 100 of the printed book. He has held that Khairati Lal's objections were "frivolous" and did not "rest on any solid foundation." These objections are printed at pp. 80 and 81 of the printed book and we have heard Mr. Santanam in support of them while Mr. Moti Sagar has addressed us on behalf of Kanhaiya Lal. The first point argued at the Bar related to paras. 3 and 4 of the objections, in which exception was taken to the order of reference by this Court on 15th October 1914.

It was alleged that on that date Lala Balwant Kai had appeared on behalf of Khairati Lal and had objected to the



order of reference being made but that he was not heard and his appearance ignored. It appears however that Lala Balwant Rai had no power of attorney authorizing him to act and our attention has not been drawn to any powers of attorney that can be regarded as a sufficient authorization for his appearance. In these circumstances we must hold that there is no force in this objection. Similarly there is not sufficient proof to support the allegations made in para. 1(a) of the objections, which we also overrule. It is not necessary to deal with the remaining objections in detail as we think the award must be set aside for the reasons given in paras. 2 (d) and 2 (g) of the objections. It is alleged that the arbitrator was guilty of legal misconduct inasmuch as he made certain private inquiries behind the back of Khairati Lal from Sultan Singh and others. As to the inquiries from Sultan Singh it is alleged by Kanhaiya Lal that these were made to the knowledge and at the instance of Khairati Lal. Whether or not this was the case there seems no doubt that the arbitrator made inquiries from some person or persons unknown. This is clear from the award at p. 17 of the printed book. In his statement however the arbitrator states (p. 95, line 30):

"I did not make any more inquiries in the case with the exception of inquiries from Sultan Singh and consulting the records of the case."

This statement is clearly untrue as is evidenced by his own award, and this being so we are unable to accept his statement on other points as to what Khairati Lal admitted or stated to him. It is beyond dispute that an arbitrator must come to his decision on evidence taken before both parties or after having given both parties an opportunity of being present at the inquiry and the making of private inquiries vitiated the award: see *Ganes Narain Singh v. Malida Koer* (1) and *Daya Kishen v. Dharam Das* (2). It is impossible to say how far the arbitrator was influenced by the private inquiries made by him nor do we know what these inquiries were. In our opinion the arbitrator's action in making private inquiries amount to legal misconduct sufficient to vitiate the award.

His denial as to those inquiries also

(1) [1911] 10 I. O. 450.

(2) [1907] 4 A. L. J. 159.

renders it difficult to accept his allegation as to what Khairati Lal said to him. He has kept no note or record of these statements and admissions and we are unable to place reliance on his oral statement. In these circumstances we must accept the objections and we set aside the award accordingly. The appeal must now be heard in due course. Costs of these proceedings will follow the event.

R.M./R.K.

*Award set aside.*

### A. I. R. 1919 Lahore 209

SHADI LAL AND LEROSSIGNOL, JJ,  
*Zafar Ali*—Plaintiff—Appellant.

v.

*Kishen Chand and others*—Defendants  
—Respondents.

Second Appeal No. 1634 of 1917, Decided on 20th February 1919, from decree of Dist. Judge, Lahore, D/- 22nd February 1917.

(a) Mahomedan Law—Wakf—Trustee cannot grant lease in perpetuity—Power to grant lease enunciated.

According to Mahomedan law, the trustee of a religious endowment cannot grant a lease in perpetuity, nor can he create a lease of agricultural land for a period exceeding three years and of other property for a period exceeding one year: 5 W. R. 158, *Foll.*

[P 210 C 1]

(b) Limitation Act (1908), Art. 134—"Transfer" includes lease in perpetuity.

The word "transfer" in Art. 134, is wide enough to include a lease in perpetuity: 48 Cal. 34 and 40 Mad. 745, *Foll.*

[P 210 C 2]

(c) Limitation Act (1908), Art. 134—Property conveyed or bequeathed in trust alienated by trustee—Suit to recover possession—Period of limitation commences from date of alienation.

The period of limitation for a suit to recover possession of immovable property conveyed or bequeathed in trust and afterwards transferred by the trustee for valuable consideration is prescribed by Art. 134 the period being reckoned from the date of the alienation.

[P 210 C 2]

*Moti Sagar and M. N. Mukerjee*—for Appellant.

*Tek Chand, Asghar Beg and Niaz Ali*—for Respondents.

**Judgment.**—The action, which has given rise to this second appeal, was brought by the muttwali of Wazir Khan's Mosque for the ejectment of one Ahmad Ali and his alinees from a site which is occupied by a shop belonging to the said Ahmed Ali. The learned District Judge finds that part of the site is the property of Ahmad Ali; and that the rest, though belonging to the religious endowment, was granted to his predecessor on a perpetual lease; and that the plaintiff's suit for ejectment is barred by time.



The first question which requires consideration is, whether the lessee got the land belonging to the mosque on a permanent tenancy. Now, the following facts emerge from the pleadings of the parties and the evidence on the record. (1) the origin of the tenancy is unknown. There is no deed recording the terms of the lease, nor is it known when the lease was created, beyond the fact the land was in possession of the tenant certainly in 1866, and the lease must therefore have been granted sometime before that year; (2) the tenancy was evidently for building purposes, because it is clear that a pakka shop was constructed upon the site and has been in existence all along; (3) the tenancy is a heritable one, having descended from one Ghulam Muhammad to his relative Muhammad Ali, and from the latter to his son Ahmad Ali.

Further, it has been alienated, twice, once by a mortgage effected in 1893, and again by a sale in favour of the defendant Mirza Qasim Beg. (4). The tenant has been paying a uniform rent at the rate of 12 annas per annum, and it is not even alleged that the rent has ever varied during the period of 50 years or so. Upon these facts we have no hesitation in concurring with the District Judge that the tenancy is of a permanent character, and that the plaintiff's contention that the defendants are tenants-at-will must be rejected. The plaintiff however is on firm ground when he contends that the muttwali, being a trustee of the endowment, had no authority to grant a lease in perpetuity. It may be that in order to create a prosperous bazaar and to induce persons to build upon different plots of land, the then incumbent of the office considered it necessary, in the interests of the endowment, that leases in perpetuity be granted to the persons who were prepared to expend money on building shops; and that the lease in question was a part of that scheme. The transaction may have been beneficial to the mosque, but we are clear that it was beyond the power of the trustee. According to the Mahomedan law, the trustee of a religious endowment cannot create a lease of agricultural land for a period exceeding three years and of other property for a period exceeding one year. A lease in perpetuity at a fixed rent is

invalid: vide *inter alia* *Shoojat Ali v. Zumeerooddeen* (1).

Though the transaction was in excess of the authority conferred by law on the trustee, it is now too late to impugn it. Art. 134, Lim. Act, 1908, prescribes a period of 12 years for a suit to recover possession of immovable property conveyed or bequeathed in trust and afterwards transferred by the trustee for a valuable consideration; and we consider that the defendants can successfully invoke the aforesaid Art. It is to be observed that the word "transferred" has now replaced the word "purchased" used in the corresponding Article of the Act of 1877; and that "transfer" is wide enough to include a lease in perpetuity. The matter does not admit of any doubt, and if any authority were needed, we would cite *Rameshwar Matia v. Jiu Thakur* (2) and *Baluswamy Aiyar v. Venkitaswamy Naicken* (3), both of which are directly in point. Mr. Moti Sagar is unable to invite our attention to any case which lays down a contrary rule. As the tenant agreed to pay a yearly rent the transfer was for a valuable consideration; and it is not necessary that the consideration should be adequate or that the tenant should pay a bonus or a lump sum in advance in order to establish that the transaction is for valuable consideration. The learned pleader, in order to get over the bar of limitation, argues that the period of limitation begins not from the date of the alienation, but from the date when the plaintiff succeeded to his office. This contention runs counter to the express words of the statute. It is true that under the Limitation Act of 1877 it was held that, as Art. 134 confined itself to the case of a purchase, the limitation applicable to a suit brought to recover the property transferred in any other manner was that prescribed by Art. 144; and that there was some divergence of judicial authority on the question as to whether the terminus a quo for a suit of that kind was the date of the alienation or the date of the plaintiff's appointment to the office of trustee. But we are not aware of any case, and indeed none is cited by Mr. Moti Sagar, which laid down that though a particular case was governed by Art. 134, yet

(1) [1866] 5 W. R. 158.

(2) [1916] 43 Cal. 34=29 I. C. 337.

(3) [1917] 40 Mad. 745=40 I. C. 531.



the time from which the period began was not the date of the alienation.

As stated above, the action with which we are dealing comes within the scope of Art. 134, Lim. Act, 1908, and it is clear that the date of the alienation must be taken to be the terminus from which the period of 12 years is to be reckoned. Accordingly we hold that though the transaction was ultra vires the trustee, it is protected from attack by the lapse of time. The judgment of the lower appellate Court is therefore confirmed, and the appeal is dismissed with costs.

R.M./R.K. *Appeal dismissed.*

### A. I. R. 1919 Lahore 211 (1)

SHADI LAL, J.

*Jinda*—Convict—Appellant.

v.

*Emperor*—Opposite Party.

Criminal Appeal No. 338 of 1917, Decided on 30th August 1917, from order of Magistrate, First Class, Gurdaspur, D/- 29th March 1917.

Arms Act (11 of 1878), Ss. 19 and 20—"Arm" defined—Possession of *chhavi* is offence.

To determine whether a particular instrument is an arm within the meaning of the Arms Act, the real test is whether it is usually employed for the purpose of offence or defence: 16 P. R. 1900 Cr. Foll. [P 211 C 1]

The possession of a *chhavi* is unlawful under the Arms Act: 28 I. C. 796, Foll. [P 211 C 1]

*Morton*—for Appellant.

**Judgment.**—This is a very clear case under S. 20, Arms Act, and does not require any lengthy discussion. There is a mass of evidence upon the record to prove the fact that on the night of 19th February 1917 the appellant, *Jinda*, was arrested outside the *abadi* of the town of Sri Gobindpur, and that upon search a *chhavi* blade was found concealed in his loin cloth. The finding of the Magistrate upon this point has not been seriously assailed by the learned counsel for the appellant. The contention that *chhavi* does not come within the category of the word "arms" in the Arms Act cannot be accepted. As pointed out in *Crown v. Santa Singh* (1), the real test is whether a particular instrument is usually employed for the purpose of offence or defence and this test is fully satisfied by the weapon in question. There are numerous cases in which the possession of *chhavi* has been held to be unlawful under the Arms Act, 11 of 1878: vide

(1) [1900] 16 P. R. 1900 Cr.

inter alia, *Khem Singh v. Emperor* (2). The fact that the offender was passing in front of the *thana* when leaving the town of Sri Gobindpur and that the *chhavi* was concealed in his loin cloth goes to show that he concealed it with the intention that it should not be known to the police. These and other circumstances bring the case under S. 20 of the aforesaid Act. For the reason set out above I confirm the conviction, and in view of the notorious character of the appellant I am not prepared to hold that the sentence of five years' rigorous imprisonment is too severe. The appeal is accordingly dismissed.

R.M./R.K. *Appeal dismissed.*

(2) [1915] 8 P. R. 1915 Cr.=28 I. C. 796=16 Cr. L. J. 412.

### A. I. R. 1919 Lahore 211 (2)

LE ROSSIGNOL, J.

*Devi Dial* and others—Appellants.

v.

*Sundar Das* and others—Respondents.

Misc. First Appeal No. 569 of 1918, Decided on 18th October 1918, from order of Dist. Judge, Shahpur, D/- 5th November 1917.

Provincial Insolvency Act (3 of 1907), Ss. 36 and 37—Transfer set aside—Transferee can prove his antecedent debts as unsecured creditor.

Where an alienation effected by an insolvent is annulled under Ss. 36 and 37 by the Insolvency Court, the alienee may prove as an unsecured creditor just antecedent debts which existed before the fraudulent transfer but were included in the consideration therefor.

[P 211 C 2]

*Ram Chand*—for Appellants.

*Sheo Narain*—for Respondents.

**Judgment.**—Certain alienations effected by insolvents were annulled under Ss. 36 and 37, Provincial Insolvency Act, by the Insolvency Court and that Court's order was confirmed on appeal by this Court and the question now for decision is whether the alienees, the transfers in whose favour have been annulled may prove as unsecured creditors, their claims represented by the consideration for the annulled transfers. The District Judge has ruled that it is open to the transferees to prove genuine debts and there are cross appeals against that finding. The creditors of the insolvent firm contend that the original debts due by the insolvents to the transferees were merged in the transfers, and that as the transfers were in fraud of the general body of



creditors they are null; further that in virtue of S. 23, Contract Act, the consideration for them cannot form the basis of any claim. The transferees' grounds of appeal are not intelligible, but Mr. Sheo Narain explained that the appeal refers to two items, one of Rs. 1,700 and the other of Rs. 700 (Transfers A-1, C-1 and C-2), which the District Judge held must be treated as fictitious, having been so ruled by his predecessor. Mr. Sheo Narain however dropped his appeal, when it was pointed out to him that these items did not purport to be genuine antecedent debts, but to have been paid at the time when the annulled alienations were executed. Authority on the point involved in the creditors' appeal appears to be somewhat meagre, but it was laid down in *Myers, In re, Myers Ex parte* (1) that a creditor cannot prove in bankruptcy for money paid by him to the insolvent in the course of carrying out a transaction devised in fraud of the general body of creditors. This decision is based probably upon the principle that no Court will grant relief, which reposes on a fraudulent transaction, but I can find no authority for the doctrine that just antecedent debts which existed before the fraudulent transfer but were included in the consideration therefor cannot be proved, and there appears to be no sound legal prohibition against their proof in bankruptcy. For these reasons the District Court appears to have laid down for itself a correct rule, viz. to accept proof of all genuine debts due by the insolvent to the transferees prior to the execution of the now annulled transfers and to reject proof of moneys paid at the time in part consideration of those transfers. The appeal is dismissed with costs.

R.M./R.K. *Appeal dismissed.*

(1) [1908] 1 K. B. 941.

## A. I. R. 1919 Lahore 212

SHADI LAL, J.

*Isar Mal and others*—Plaintiffs—Appellants.

v.

*Tuka and others*—Defendants—Respondents.

Second Appeal No. 2197 of 1818, Decided on 5th March 1918, from decree of Dist. Judge, Multan, D/- 15th April 1918.

Registration Act (1908), S. 17 (b)—Deed merely altering term as to interest payable on mortgage is not transaction creating or declaring interest in land and does not come under S. 17 (b).

A deed altering merely the term as to the interest payable on a mortgage is not a transaction creating or declaring an interest in land and does not come within the purview of S. 17, Cl. (b). [P 213 C 1]

In a suit for redemption of a mortgage the descendants of the mortgagee contended that the mortgage, which was originally in the lekha mukhi form, was converted into one sud kasur barabar, and relied on an agreement executed by the mortgagor in favour of the mortgagee. It appeared that the only variation this agreement had made in the original deed was that the produce of the land under mortgage was to be taken in lieu of interest and was not to be appropriated, as provided in the original deed, first towards the interest and the balance, if any, towards the principal mortgage money:

*Held*: that the document was admissible in evidence without registration. 24 Cal. 20; 22 Mad. 217 Foll; 4 I. C. 713; 12 I. C. 723 (F.B.); Dist. [P 213 C 1]

*Gokal Chand Narang*—for Appellants.

*Moti Sagar*—for Respondents.

**Judgment.**—The land in dispute belonged to one Sohara, who mortgaged it some time before 1878 to Asa Mal, the father of the plaintiffs, the form of the mortgage being sud kasur barabar, i. e., that the rents and profits were to be taken in lieu of interest on the mortgage money. On 7th May 1878 Asa Mal sub-mortgaged the land to Raja Mal, the ancestor of the defendants, by means of a registered mortgage deed. This mortgage was of the form usually known as lekha mukhi mortgage, which means that the rents and profits received by the mortgagee are, after deducting expenses, to be applied by him towards the reduction of the principal mortgage money and the interest thereupon. The plaintiffs brought the action, out of which this appeal arises, for the redemption of the mortgage, and the main question for determination is whether Raja Mal's descendants have succeeded in establishing that the mortgage in favour of their ancestor was subsequently converted into one sud kasur barabar. Now in support of their contention they rely, in the first instance, upon an agreement executed by Asa Mal in favour of Raja Mal on 10th Chet 1935 corresponding to 25th March 1879. The defendants object to the admissibility of this document on the ground of want of registration, but this objection has been overruled by both the Courts below.



I have carefully considered the terms of the document and am unable to accede to the contention advanced by Mr. Gokal Chand Narang that the document is compulsorily registrable. The only variation, which it makes in the terms of the registered deed dated 7th May 1878, is that the produce of the land was to be taken in lieu of interest, and not to be appropriated, as provided in the original deed, first towards the interest and the balance, if any, towards the principal mortgage money. I am not prepared to hold that a deed altering merely the term as to interest is a transaction creating or declaring an interest in land and comes within the purview of S. 17, Cl. (b), Registration Act. Mr. Gokal Chand Narang invites my attention to the judgments of the Calcutta High Court in *Durga Prosad Singh v. Rajendra Narain Bogchi* (1) and *Lolit Mohan Ghose v. Gopali Chauk Cool Co. Ltd.* (2). The latter judgment which affirms the former judgment was delivered by a Full Bench, and lays down the principle that a document altering the essential terms of a registered lease requires compulsory registration. Neither of these rulings is on all fours with the present case. Per contra, we have got an earlier judgment of the Calcutta High Court in *Satyesh Chuunder Sircar v. Dhunpul Singh* (3) and a ruling of the Madras High Court in *Obai Goundan v. Ramalinga Ayyar* (4), which enunciate the principle that a document varying only one of the terms of a lease, namely, as to the amount of the rent to be paid, is not an instrument relating to an interest in immovable property. Following these rulings I hold that the agreement of March 1879 is admissible in evidence.

The defendants however do not rest their case upon this agreement only. They rely also upon a mutation effected in their favour on 12th November 1898, by which a previous entry relating to the lekha mukhi mortgage was altered to one showing the mortgage in their favour to be sud kasur barabar. It is to be observed that the mutation was effected before the Settlement of 1900—1903, and that neither the plaintiffs nor their predecessor ever questioned the new entry

which, as the learned District Judge points out, has stood the test of a revision at settlement. It is therefore clear that apart from the document of March 1879 the defendants have succeeded in showing that the mortgage in their favour must be regarded as one by which they were entitled to receive the produce of the land in lieu of interest. On the question of the sale of the property by Sohara's heirs in favour of the contesting defendants, the learned District Judge has recorded a finding of fact which cannot be assailed in second appeal. For these reasons I confirm the judgment of the lower appellate Court and dismiss the appeal with costs.

R.M./R.K.

Appeal dismissed.

### A. I. R. 1919 Lahore 213

SHADI LAL AND MARTINEAU, JJ.

Sri Ram—Plaintiff—Appellant.

v.

Delhi Electric Tramways Lighting Co., Ltd.—Defendant—Respondent.

First Appeal No. 861 of 1915, Decided on 17th December 1918, from decree of Dist. Judge, Delhi, D/- 14th December 1914.

(a) Tort—Negligence—Personal injuries—Damages—Mode of assessment—Person injured is entitled to damages for personal suffering, loss of enjoyment, pecuniary expenses and for probable future loss of income.

Where a person has suffered personal injuries on account of the negligence of another, he is entitled to damages for personal suffering and for loss of enjoyment of life and also to actual pecuniary loss resulting to, and the expenses reasonably incurred by him. If he is engaged in a profession or trade or other occupation, he must be compensated for the probable future loss by reason of incapacity or diminished capacity to work. [P 214 C 2]

(b) Tort—Negligence—Personal injuries—Damages—Probable future loss of income—Basis of assessment is average earnings—Duty of Court enunciated.

In assessing damages arising from the probable loss of future income the plaintiff's average earnings form the natural basis. The Court has to consider what the plaintiff's income would probably have been, how long that income would probably have lasted and must take into consideration all the other contingencies to which the profession, trade or other occupation in which he is engaged is liable; *Potter v. Metropolitan Railway Co.* (1878) 28 L. T. 735, *Foll.*; *Phillips v. London and South Western Railway Co.* (1880) 5 Q. B. D. 78, *Foll.* [P 214 C 2 P 215 C 1]

The law does not require the Court to give the injured party the value of an annuity for the same amount as his average income for the rest of his life. [P 215 C 1,2]

(1) [1910] 37 Cal. 293=4 I. C. 713.

(2) [1912] 39 Cal. 284=12 I. C. 723.

(3) [1897] 24 Cal. 20.

(4) [1899] 22 Mad. 217.



*Santanam and Tara Chand*—for Appellant.

*Moti Sagar and Raj Narain*—for Respondent.

**Judgment.**—The action, which has given rise to this appeal, was brought by the plaintiff Sri Ram for the recovery of damages for personal injuries caused to him by the defendant's negligence. It is beyond dispute that on the evening of 12th February 1914, while the plaintiff was travelling as a passenger in one of the defendant company's tramcars, a collision took place between that car and another car belonging to the company with the result that the plaintiff's right leg was crushed. He was at once taken to the Civil Hospital where the Civil Surgeon, Colonel Melville, considering that amputation was necessary, performed an operation and cut off the leg a few inches above the knee joint. The learned District Judge finds that

"in addition to the injury to the tibia there was serious injury to the hip joint which will probably prevent the plaintiff from making any use of an artificial limb, and has already caused him long continued pain."

After examining the evidence to which our attention has been invited by the learned counsel on both sides we find no adequate ground for dissenting from this conclusion. It is plain that on account of the defect in the stump and the injury to the hip joint the plaintiff cannot use an artificial leg, and that he must remain a cripple for the rest of his life. Mr. Moti Sagar for the defendant contends that if the plaintiff had adopted proper precautions and treatment, he might have been in a position to use a wooden leg. This contention is based upon the evidence of Major Corry, who admittedly did not examine the plaintiff, and receives no support from other medical evidence upon the record. The injured man was taken at once to the hospital, admitted as an indoor patient, and treated by the Civil Surgeon, Colonel Melville. He remained in the hospital until 20th March when he was discharged. Major Corry himself admits that the Civil Surgeon is responsible for the treatment of the indoor patients, and that the plaintiff could not "have obtained better treatment than Colonel Melville." We consider that the plaintiff did everything which a reasonable person in his position could be expected to do, and we see no substance in the charge of

contributory negligence. The trial Judge finds that the accident was the result of the defendant's negligence, and this finding has not been challenged before us. The dispute is confined to the amount of damages. The plaintiff claimed Rs. 20,000 but the Court allowed him altogether Rs. 8,500, namely, 2,500 for "pain and interim expenses" and Rs. 6,000 for probable diminution of income. Both the parties are dissatisfied with this award. The plaintiff has appealed claiming the full amount, while the defendant has preferred cross-objections asking this Court to reduce the amount to Rs. 5,000. The principles, which guide the Court in estimating damages in a case of this kind, are well established and do not admit of any controversy. The injured person is entitled to damages for personal suffering and for loss of enjoyment of life, and also to actual pecuniary loss resulting to, and the expenses reasonably incurred by, him. If he is engaged in a profession, trade, or other occupation, he must be compensated for the probable future loss by reason of incapacity or diminished capacity to work.

Now, with reference to the first head of damages the facts which emerge from the record are that the plaintiff is permanently deprived of the use of one leg, that he suffered extreme pain during the period of five weeks when he was in the hospital, and that he suffered some pain even after his discharge from the hospital. He is unable to go about with the aid of crutches, and stands in need of a dooli which costs him Rs. 20 per month. Having regard to these facts and to the loss of enjoyment of life (the plaintiff being only 29 at the time of the accident), we are of opinion that the amount of Rs. 2,500 allowed by the District Judge is inadequate; and though it is impossible to arrive at an exact figure, we consider that Rs. 4,000 should be regarded as a fair compensation for the pain, inconvenience, loss of enjoyment of life, and the actual pecuniary loss caused to him by the wrongful act of the defendant. In assessing damages arising from the probable loss of future income the plaintiff's average earnings form the natural basis: *Potter v. Metropolitan Railway Co.* (1). At the same time however such contingencies as the

(1) [1873] 28 L. T. 735.



nature of the income, and the likelihood of its continuance, and the probable duration of the plaintiff's life, apart from the accident must all be considered. As pointed out in *Phillips v. London and South Western Railway Co.* (2), the Court has to consider what the plaintiff's income would probably have been, how long that income would probably have lasted, and must take into consideration all the other contingencies to which the profession, trade or other occupation in which he is engaged is liable. It must be remembered that the damages are awarded once for all, and must be given on the fairest estimate which can be made of what the probable continuance of the plaintiff's income would have been.

Now, the District Judge finds that the plaintiff carried on a timber business which brought him an income of Rs. 1,000 per annum; and that he had two rice shops in partnership with his three brothers, who formed a joint Hindu family with him. The evidence with respect to the amount of income does not lead to any definite conclusion, but we think that the District Judge's finding as to the profit accruing from the timber business may be accepted. The learned Judge holds that the total income of the rice shops was about Rs. 3,000 per annum, and that the plaintiff's share would be about Rs. 700. Now, it is true that upon a division of the income among the brothers the plaintiff would be entitled to only one fourth of the total income of these shops, but it is plain that two of the brothers are infants, and are incapable of doing any work, and that the profits must be attributed to the earning capacity of the remaining two brothers. This is a matter which the trial Judge has not taken into consideration, but it has an important bearing upon the earning capacity of the plaintiff which has been injuriously affected by the accident. It seems to us that a fair estimate of the income (including the profits of the timber business) attributable to the plaintiff should be Rs. 2,500, and not 1,700 or 1,800 as found by the District Judge.

The law does not require the Court to give the injured party the value of an annuity of the same amount

as his average income for the rest of his life. Though the rules governing the assessment of damages are simple enough, yet the amount to be awarded in a particular case is not capable of any mathematical precision. Having regard to the earning capacity of the plaintiff as stated above, and to the probable loss to be sustained by him, we are of opinion that the sum allowed by the District Judge should be increased by Rs. 50 per cent, namely, that the plaintiff should get Rs. 9,000 under this head of damages. The result is that we accept the plaintiff's appeal, and in modification of the decree of the lower Court we grant him a decree for Rs. 4,000 plus Rs. 9,000 = Rs. 13,000; but in view of the partial success of the plaintiff we leave the parties to bear their own costs in this Court. The cross-objections are dismissed with costs.

R.M./R.K.

*Appeal accepted.*

### A. I. R. 1919 Lahore 215

SCOTT-SMITH, J.

*Ralu*—Plaintiff—Appellant.

v.

*Phalla*—Defendant—Respondent.

Second Appeal No. 2006 of 1918, Decided on 31st March 1919, from decree of Addl. Dist. Judge, Hoshiarpur, D/- 10th January 1918.

**Compromise—Consideration—Forbearance to sue—Some liability must be shown to exist or to be reasonably supposed to exist.**

In order that a forbearance to sue should amount to a consideration for a compromise, some liability must be shown to exist, or to be reasonably supposed to exist, by the parties. If one of the parties to the compromise has no case and knows that he has none, the compromise would not be held binding. [P 216 C 2]

*Fakir Chand*—for Appellant.

*Badraddin*—for Respondent.

**Judgment.**—A preliminary objection is raised on behalf of the respondent to the effect that the appeal is barred by time. It appears that the parties were not present when the judgment was pronounced by the lower appellate Court on 10th January 1918, but a parwana intimating the result of the appeal was sent to the Munsif of Una on 18th January. The District Judge's letter, which has been received in answer to an inquiry by this Court, shows that the parwana was not received back by the lower appellate Court and therefore it is impossible to say whether the Munsif com-



municated the result of the appeal to the parties or not. The appellant has filed an affidavit to the effect that he only received the intimation of the result of the appeal one week before he filed the appeal in this Court. No counter-affidavit is put in by the other side and I am therefore of opinion that sufficient cause has been shown for entertaining the present appeal. The facts of this case appear sufficiently from the judgment of Mr. Kennaway, District Judge, Hoshiarpur, dated 23rd February 1917, whereby he remanded the case for fresh trial to the first Court. Briefly the facts are that Ralu, plaintiff-appellant, by a registered sale deed, dated 10th August 1912, sold his mortgage rights in three plots of land to Phalla, defendant-respondent. Phalla re-transferred his rights in one of the plots to Gangu. Subsequently a dispute arose between Ralu and Phalla and the mutation was rejected, as Ralu said that there was no consideration for the sale. Subsequently Ralu and Phalla made a compromise and on 12th June 1915 mutations were sanctioned giving effect to the compromise, by which the transfer of the plot to Gangu was confirmed and the remaining two plots were shared half and half by Ralu and Phalla. In the present suit Ralu seeks to avoid the transfer entered in those mutations and asks for possession of the whole of plot No. 3 and half of the other two plots on the ground that there was no consideration for the sale or for the compromise.

The first Court held there was no consideration for the original sale which was entered into to defraud the vendor's creditors and that as the vendee acquired no rights under the sale which was void for want of consideration, the compromise was also without consideration and could not be held to be binding. It accordingly decreed the plaintiff's claim. The District Judge said that he was prepared to agree with the lower Court's findings to the effect that the sale was without consideration, though in the latter part of his judgment he says that the passing of consideration is doubtful. There is however no contention before me that consideration for the sale passed and I may therefore proceed on the assumption that there is a concurrent finding of fact that the sale was without consideration. The District Judge at the

same time was of opinion that consideration for the compromise consisted in relinquishment by the defendant, Phalla, of part of his rights in the land, to which rights he was entitled *qua* Ralu by virtue of his original sale deed. He goes on to say that Phalla forbore to exercise his rights, whatever they were, given him by that deed, which rights he was then entitled to urge in a Court and had urged in the first Court and in that Court, and compromising with respondent and Gangu, accepted something less than those rights. This, in the District Judge's opinion, constituted consideration *qua* plaintiff. He quoted the dictum:

"A forbearance to sue, even for a short time, is consideration for a promise, although there is not waiver or compromise of the right of action."

He accordingly accepted the appeal and dismissed the plaintiff's suit. Plaintiff has preferred a second appeal to this Court, and it is contended that if there was no consideration for the original sale the defendant acquired no rights thereby and therefore there was no consideration for the compromise. The first Court has quoted authority in support of the proposition that in order that forbearance should be a consideration, some liability must be shown to exist, or to be reasonably supposed to exist, by the parties. It says that if one of the parties to the compromise has no case (and Phalla had none, as his sale deed was without consideration), and knows that he has none (as Phalla knew), the agreement to compromise would not be held binding: see the remarks of Cockburn, C. J., in *Calisher v Bischoffsheim* (1). In my opinion the view of the law put forward by the Subordinate Judge is correct. If Phalla had no rights and knew he had none under the deed of sale (and he had none, for it is found that the deed was without consideration), then he had no right to sue and his forbearance to sue amounted to nothing at all. Ralu in fact received no consideration for agreeing to the compromise, which is not binding on him.

I accept the appeal and setting aside the order of the lower appellate Court decree plaintiff's suit for the land claimed so far as it is in the possession of Phalla. Gangu has not been made a party to this appeal and, therefore no decree can be

(1) [1870] 5 Q. B. 449.



passed against him. Phalla will pay costs to Ralu throughout.

R.M./R.K. *Appeal accepted.*

### A. I. R. 1919 Lahore 217

SHADI LAL AND WILBERFORCE, JJ.

*F. A. Gregory* — Defendant — Appellant.

v.

*Albert Puech*—Plaintiff—Respondent.

First Appeal No. 749 of 1915, Decided on 7th December 1918, from order of Sub.-Judge, 1st Class, Lahore, D/. 27th January 1915.

(a) Civil P. C. (1908), S. 21—Suit tried in wrong Court—No failure of justice—Plea of want of jurisdiction cannot be raised in appeal.

Where there has been no failure of justice from the trial of a case in a wrong Court, the plea as to want of territorial jurisdiction cannot be entertained in appeal: *A. I. R. 1914 Lah. 385, Foll.* [P 217 C 2]

(b) Civil P. C., (1908), O. 6, R. 17—Court has wide discretion to amend pleadings—Order allowing amendment of plaint will not be set aside unless defendant is prejudiced.

Order 6, R. 17, Civil P. C., confers a very wide discretion upon the Court with respect to the amendment of pleadings, and an order allowing amendment of a plaint will not be set aside when the amendment has not caused any prejudice to the defendant. [P 217 C 2]

(c) Civil P. C. (1908), O. 20 R. 16—Suit for dissolution of partnership—Rendition of accounts can be directed only where that relief alone would enable claimant to satisfactorily assert his legal right.

Rendition of accounts can only be directed where the relationship between the parties is such that it is the only relief which would enable the claimant to satisfactorily assert his legal right.

In a suit for dissolution of partnership and appointment of a receiver and payment to the plaintiff of his share of the profits, it appeared that the plaintiff had financed the business which the defendant carried on as a contractor and that in pursuance of an agreement between the parties the plaintiff was entitled to receive interest at 12 per cent per annum on the amount advanced by him and a further sum equal to 2 per cent of the net profits made by the defendant on every contract carried on by him. The defendant also undertook "to keep full and true accounts of the income and expense of the business" and also stipulated that the accounts "will be balanced annually and interest charged thereon".

*Held:* that under the circumstances and in view of O. 20, R. 16, the plaintiff had established his right to a rendition of accounts. [P 218 C 1]

*Obedulla*—for Appellant.

*Herbert and Parker*—for Respondent.

**Judgment.**—This appeal arises out of an action which, upon the plaint as originally framed by the plaintiff, was

one for dissolution of partnership and rendition of accounts. The claim was resisted by the defendant on various grounds. The Subordinate Judge disposed of these pleas by orders passed on different dates. The question of jurisdiction was decided in favour of the plaintiff on 19th March 1913, but the contention urged by the defendant that the transaction between the parties did not in law amount to partnership was upheld on 27th February 1914, and the Court holding that no prejudice would be caused to the defendant by an amendment of the plaint directed the plaintiff to amend the plaint in accordance with its decision on the issue relating to partnership. Upon this requisition being complied with, the suit was heard on the merits and finally resulted in a decree for the rendition of accounts, against which the defendant has preferred the present appeal.

Mr. Obedulla for the appellant again agitates the question of jurisdiction and contends that the cause of action arose beyond the territorial limits of the jurisdiction of the trial Court. To this argument S. 21, Civil P. C., furnishes a complete answer. We are unable to discover any failure of justice resulting from the trial of the suit in the wrong Court (assuming for the sake of argument that the Lahore Court had no jurisdiction to entertain the suit): vide *Ratti Ram v. Kundan Lal* (1). The decree cannot therefore be impeached upon the ground of the alleged want of jurisdiction.

Nor do we see any force in the contention that the lower Court should not have allowed the amendment of plaint. The provisions of the present Civil Procedure, Code, vide O. 6, R. 17, confer a very wide discretion upon the Court with respect to the amendment of pleadings. There can be no doubt that the amendment has caused no prejudice to the appellant. The cardinal point for determination is whether the plaintiff is entitled to a rendition of accounts. Now, it is beyond dispute that he financed the business which the defendant carried on as a contractor, and that in pursuance of the agreement entered into between the parties, the plaintiff was entitled to receive interest at 12 per cent per annum on the amount advanced by him, and a further sum equal to 25 per cent of the

(1) *A. I. R. 1914 Lah. 385=26 I. O. 549=87 P. R. 1914.*



net profits made by the defendant on each and every contract carried on by him. Moreover the defendant undertook "to keep full and true accounts of the income and expense of the business," and also stipulated that the accounts "will be balanced annually and interest charged thereon." Mr. Obedulla for the appellant relies upon a Division Bench judgment of this Court in *Jowahir Singh v. Haria Mal* (2) in support of the proposition that the right to claim a rendition of accounts is an unusual form of relief and can be granted only in certain specified cases. We have no quarrel with this exposition of law; but that very judgment makes a special reservation in favour of trade usage or definite contract between the parties, and rightly points out that rendition of accounts is only to be claimed when the relationship between the parties is such that it is the only relief which would enable the claimant to satisfactorily assert his legal right.

Now, we have no hesitation in holding that it is impossible for the Court to determine the amount due to the plaintiff without going into the accounts. O. 20, R. 16, Civil P. C., provides that where it is necessary in order to ascertain the amount of money due to or from any party that an account should be taken, the Court shall, before passing its final decree, pass a preliminary decree directing such accounts to be taken as it thinks fit. In view of this statutory provision and of the terms of the contract between the parties, we are of opinion that the plaintiff has established his right to a rendition of accounts. The appeal therefore fails and is dismissed with costs.

R.M./R.K. *Appeal dismissed.*

(2) [1899] 60 P. R. 1899.

### A. I. R. 1919 Lahore 218

ABDUR RAOOF AND PETMAN, JJ.

*Abdul Rahman and others*—Judgment-Debtors—Appellants.

v.

*Allah Bakhsh and another*—Decree-Holders—Respondents.

Misc. First Appeal No. 2338 of 1915, Decided on 18th July 1919, from order of Senior Sub-Judge, Gujranwala, D/- 19th August 1915.

Civil P. C. (5 of 1908), S. 144—Mesne profits—Decree reversed on appeal—Successful

party is entitled to restitution including mesne profits.

If a decree is reversed in appeal the party against whom the decree had been given is entitled to have restitution of all that he has been deprived of under it including the profits accruing from property the possession of which he had been deprived of by the other party.

[P 220 C 1]

*Morton and Anant Ram*—for Appellants.

*Nanak Chand*—for Respondents.

**Judgment.**—This miscellaneous appeal has arisen out of the following facts: Muhammad Din and others, plaintiffs, brought a suit for dissolution of partnership against Nur Din, defendant, the ancestor of the present respondents to this appeal. In para. 1 of the plaint the plaintiffs stated that they (the parties) contributed funds in equal shares for the purchase of land in Mauzas Mehdpore and Pathanwali. The suit was hotly contested between the parties. Eventually Mr. Makhan Lal, Subordinate Judge, passed a decree on 31st May 1901 in the following terms:

"It is ordered that the defendant do pay to the plaintiffs Rs. 1,015-15-2, that the plaintiffs should also retain the immovable property unless the defendant chooses to have it partitioned and take his share in which case he must pay them Rs. 5,368-2-3."

It is admitted that in consequence of this decree the plaintiffs took exclusive possession of the share of the defendant in Mauzas Mehdpore and Pathanwali mentioned above. From this decree Nur Din, defendant, appealed to the Chief Court which set aside the judgment and the decree of the learned Subordinate Judge and remanded the case to be tried de novo. The order was made on 31st May 1906. On 20th October 1906 the defendant made an application under S. 583, Civil P. C., for restitution praying that the possession over his half share in the properties in Mehdpore and Pathanwali should be restored to him and that the plaintiffs should be ordered to pay mesne profits. This application was disallowed by Mr. Malan, District Judge, on 15th January 1907, on the ground that it was premature inasmuch as an order under S. 562, Civil P. C., not being a decree did not entitle the defendant to the benefit of S. 583 of the Code. This order was upheld in appeal by Rattigan J., on 31st June 1907.

On the case coming back to the original Court on remand parties agreed to refer their dispute to arbitration. The arbi-



trator gave his award under which a large sum was found due to the defendant from the plaintiffs. Objections were raised by the plaintiffs to the legality of the award on various grounds. Sardar Gulab Singh set aside the award, decided the case on the merits and passed a decree on 10th July 1919. Both the parties appealed from the decree to the Chief Court. The defendant's appeal raised the question whether Sardar Gulab Singh was justified in refusing to pass a decree in accordance with the award while the plaintiffs attacked the decree on the ground that an inadequate amount had been decreed to them. The appeal of the defendant was first taken up as it went to the root of the case and raised a question of principle. It was heard and decided by a Division Bench of the Chief Court which allowed the defendant's appeal, set aside the decree of the Subordinate Judge dated 10th July 1909, and ordered a decree to be drawn up in accordance with the terms of the award made by the arbitrator on 22nd October 1908. The appeal of the plaintiffs was dismissed. The decree of the Chief Court was passed on 14th May 1914. In the meantime the defendant had again applied for restitution. The application was transferred by the District Judge of Rawalpindi to that of Gujranwala within whose jurisdiction the property claimed was situated. Mr. Harris, the District Judge of Gujranwala, made an order on 1st July 1911 staying further proceedings under the application to 15th July 1911 at the request of the plaintiffs-judgment-debtors, who had made an application to the Chief Court for stay of execution on 19th June 1911. An order was made on 27th July 1911 staying the proceedings on condition of the plaintiffs giving security for the mesne profits to which the defendant may be entitled.

After the decision of the appeal by the Chief Court passing a decree according to the terms of the award Allah Bakhsh and Khuda Bakhsh, the heirs and legal representatives of Nur Din, defendant, on 24th March 1915 renewed the application for restitution and mesne profits. Para 5 of the application ran in these words:

"That the applicants have ultimately been declared entitled to recover Rs. 11,571-14-0 besides the other house property as detailed in the decree of the Chief Court dated 14th May 1914, and the plaintiffs' claim against the applicants has

been dismissed on the dissolution of partnership and rendition of account in accordance with the award of the arbitrator."

This application was opposed by the plaintiffs-judgment-debtors mainly upon two grounds, namely, (1) that the application purported to be an application for the execution of the decree of the Chief Court and that unless it was shown that the property claimed was given to the decree-holders under the decree they were not entitled to claim it in execution of the decree and (2) that as no mesne profits had been ordered and decreed under the above decree the decree-holders were not entitled to claim mesne profits. Both these pleas were repelled by the learned Senior Subordinate Judge of Gujranwala who by his order dated 19th August 1915, held that the decree-holders were entitled to recover by way of restitution the two properties Mehdpur and Pathanwali. The learned Senior Subordinate Judge further held on the question of mesne profits that the decree-holders were entitled to claim them from the date of the mutation entry of 1904. The judgment-debtors have filed this appeal in which they reiterate their objections taken in the Court below and challenge the right of the decree-holders to get back the possession of the above-mentioned property in the execution proceedings and also their right to claim mesne profits. The decree-holders on the other hand have filed a revision, No. 848 of 1915, in which they claim mesne profits for a longer period commencing from the year 1901, when the suit was first decreed in favour of the plaintiffs authorizing them to retain possession of the properties in dispute until payment of Rs. 5,368-2-3.

In our opinion the appeal on behalf of the plaintiffs has no force. They have misunderstood the nature of the application by which the restitution of the land in suit is claimed. This is not an application for the execution of the decree of the Chief Court dated 14th May 1914. It is substantially an application made under S. 144, Civil P. C. or it may be treated as an application asking for the revival of the previous applications made under S. 583, Civil P. C., the trial and disposal of which had been postponed on account of the pendency of the proceedings in the regular suit. Now when the suit has been finally disposed of by the



judgment of the Chief Court dated 14th May 1914, all obstacles have been removed and the decree-holders are entitled to claim the restitution of their property. As regards the rights of the decree-holders to claim mesne profits it has been held in several cases that if a decree is reversed in appeal the party against whom the decree had been given is entitled to have restitution of all that he has been deprived of under it. The Courts have always tried to put the successful party into the position in which he ought to have been. In this case there is no doubt that the decree-holders were deprived of their half share of the profits owing to the exclusive possession of the successful plaintiffs under the decree of 31st May 1901. The decree-holders are therefore entitled to all the profits of which they have been deprived by the plaintiffs-judgment-debtors. The appeal of the judgment-debtors in this view fails and is hereby dismissed with costs.

R.M /R.K.

*Appeal dismissed.***A. I R. 1919 Lahore 220**

SHADI LAL, J.

*Amritsar National Banking Co. Ltd.*—  
Defendant—Appellant.

v.

*Fazl Ilahi*—Plaintiff—Respondent.

Misc. First Appeal No. 2309 of 1918,  
Decided on 13th December 1918, from  
order of Liquidation Judge, Lahore, D/-  
20th May 1918.

Civil P. C. (5 of 1908), S. 11 and O. 8,  
R. 6—*Res judicata*—Failure to claim set off  
—Fresh suit to recover amount is not barred.

Where the defendant to a suit for the recovery of a sum of money sets up a defence of non-liability until certain goods deposited by him with the plaintiff as security are returned to him, and his defence is accepted, he is not precluded from instituting a suit to recover the goods, or the price thereof. The fact that he omitted to claim a set-off in the regular suit brought against him would not bar his claim, as he was under no obligation to avail himself of the right to claim set-off conferred by O. 8, R. 6. [P 230 C 2]

*S. K. Mukerji*—for Appellant.*Abdul Rashid*—for Respondent.

**Judgment.**—The respondent Fazl Ilahi, in answer to a suit brought against him by the Liquidator of the Amritsar National Banking Company, Limited, for the recovery of Rs 2,060, set up the defence that he was not liable to pay the money until the Bank had returned to him 12 boxes of goods placed by him in

deposit with the Bank by way of security, and valued the goods at Rs. 5,574. This defence was accepted by the Court of the Subordinate Judge, Allahabad, before whom the suit came up for final adjudication, and the claim of the Bank was rejected. It is to be observed that Fazl Ilahi did not claim a set-off, and consequently no decree could be passed in his favour. He has now asked the liquidation Judge to adjudicate upon his claim for the recovery of the goods or of the price thereof; and the question for determination is whether his omission to claim set off in the regular suit instituted against him at Allahabad operates as a bar to his present claim. Now, Expl. 4 to S. 11, Civil P. C., lays down that any matter which might and ought to have been made the ground of defence or attack in a former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

A reference to the provisions of O. 8, R. 6, which deal with set off, leaves no doubt that the defendant *may* claim a set-off, and in that case his written statement shall be treated as a plaint. But he was under no obligation to avail himself of the right to claim set off conferred by that rule and I cannot therefore hold that he is precluded by any law from claiming the amount due to him. The judgment in *Sri Gopal v. Pirthi Singh* (1) deals with a different set of facts and has no relevancy to the point before me. In that case, a mortgagee brought an action upon his mortgage-deed and impleaded a prior mortgagee as a defendant to the suit. The latter made no defence and did not claim to have his prior charge redeemed. In a subsequent suit brought by him to enforce the prior charge their Lordships of the Privy Council held that the suit was barred by Expl. 11, S. 13, old Civil P. C. It seems to me clear that it was the duty of the prior mortgagee to put forward his mortgage as a defence to the action brought by the puisne mortgage and I do not see how the decision in that case can be cited to defeat the claim of the present respondent. I accordingly dismiss the appeal with costs.

R.M./R.K.

*Appeal dismissed.*

(1) [1902] 24 All. 429=29 I. A. 118 (P.O.).



## A. I. R. 1919 Lahore 221

PETMAN, J.

*Raj Mal-Bishambar Nath*—Plaintiffs  
—Appellants.

v.

*Diwan Chand and another*—Defendants—Respondents.

Second Appeal No. 2744 of 1918, Decided on 2nd May 1919, from decree of Dist. Judge, Gurdaspur, D/- 28th June 1918.

Civil P. C. (1908), S. 100—Sole question one of fact and inference to be drawn from fact—Second appeal does not lie.

Where the sole question in a case is one of fact and the inference to be drawn from facts, a second appeal is not competent. [P 222 C 1]

*Govind Das*—for Appellants.

*Moti Sagar*—for Respondents.

**Judgment.**—This is a second appeal from the judgment of the District Judge of Gurdaspur, dated 28th June 1918. For the respondents a preliminary objection is raised that no second appeal lies.

Mr. Moti Sagar urges that the sole questions which arise are ones of fact and the inference to be drawn from them. The lower appellate Court was not satisfied that the plaintiff's claim had been substantiated for the reasons stated by him, namely, that it was most improbable that large sums would have been advanced without any signature of the borrower, that the fact that Bishambar Das made no attempt to recover the alleged debt cast considerable suspicion on the whole case that the explanation advanced by defendants' counsel (though incapable of any definite proof) certainly fitted in with the fact and that it was easy for the receivers to produce false evidence of the alleged loans. He also urged that the Court was entitled to draw inferences from the fact of a suit being pending against Bishambar Das for accounts. He relied on *Pharya Mal v. Ilahi Bakhsh* (1), *Durga Chowdhrahi v. Jewahir Singh Chowdhri* (2) and *Balkishan v. Rai Bahadur* (3). Bhagat Govind Das for the appellants submitted that a second appeal lies if evidence is ignored and if reliance is placed on evidence or matter not on the record. As to the former he urged that the receivers sent a demand for payment to the respondent on 8th September 1915 and the respondent sent no reply and that the lower appellate

Court had ignored this fact and should have drawn an inference adverse to the respondent. Though the notice by the receivers is on the record, Bhagat Govind Das is unable to indicate how it has been proved. I must hold it unproved. Further it has not been proved that no reply was sent. No specific ground of appeal with regard to this point is set out in the grounds of appeal.

With regard to the second point it is urged that delay in demanding repayment is not evidence of the non existence of a debt, nor could the lower appellate Court legally draw any inference adverse to his client from the fact of a suit having been instituted against him for accounts. Reliance is placed on *Nobendra Kishore Roy v. Srimati Rahima Banu* (4), *Ram Subhag Chaube v. Kesho Prasad Singh* (5), *Lakhichand Chatrabhuji Marwadi v. Lalchand Ganpat Patil* (6) and Case No. 1564 of 1916 reported as *Sher Singh v. Dalip Singh* (7). *Nabendra Kishore Roy v. Srimati Rahima Banu* (4) is not in point. In that case the lower appellate Court had assumed that certain chittas were public documents and it was therefore impossible for the High Court to say how far the lower Court was influenced by that idea. In *Lakhichand Chatrabhuji Marwadi v. Lalchand Ganpat Patil* (6) the lower Court had inferred from the mere fact that the plaintiff delayed bringing his suit that he must have been receiving interest all that time and on that calculation it reached the conclusion that the debt had been fully satisfied. The High Court held that the inference in question was one not drawn from any evidence and the drawing of it was an error of law which could be rectified in second appeal. But in that case no payment of interest had been alleged and the case was decided solely on the inference. In the present case other facts are relied on and the inference drawn is not analogous.

In *Ram Subhag Chaube v. Kesho Prasad Singh* (5) the lower Court had gone so far as to hold that though the oral evidence did not break down in any way it would accept no evidence short of documentary evidence of adoption coming

(1) [1917] 89 P. R. 1917=40 I. O. 772.

(2) [1891] 18 Cal. 28=17 I. A. 122 (P.O.).

(3) [1917] 87 I. O. 489.

(4) [1915] 31 I. O. 695.

(5) [1915] 29 I. O. 673.

(6) [1918] 42 Bom. 352=45 I. O. 555.

(7) [1917] 42 I. O. 282.



from the hand of the person who had a right to adopt. This ruling does not help the appellant. *Sher Singh v. Dalip Singh* (7) is also beside the point. In that case the lower appellate Court had not referred to or discussed the evidence and the judgment consisted of one sentence. The preliminary objection must succeed. I dismiss the appeal with costs.

R.M./R.K. *Appeal dismissed.*

### A. I. R. 1919 Lahore 222 (1)

SHADI LAL AND LEROSSIGNOL, JJ.

*Kishen Chand and others*—Plaintiffs—Appellants.

v.

*Municipal Committee, Amritsar*—Defendants—Respondents.

Second Appeal No. 1391 of 1915, Decided on 8th July 1918, from decree of Dist. Judge, Amritsar, D/- 9th April 1915.

(a) Punjab Municipal Act (3 of 1911), S. 47—Contract not signed as under S. 47 is not binding.

A contract entered into with a Municipal Committee which is not signed by the president, nor by the Vice-President nor by any member of the Committee, as required by S. 47, is not binding on the Committee. [P 222 C 1]

(b) Registration Act (16 of 1908), S. 17—Deed of release declaring giving up of any interest is compulsorily registrable.

A document which contains a declaration by a person that he holds no title in immovable property of Rs. 100 in value requires registration, and if it is unregistered, it cannot be received as evidence of any transaction affecting such property. [P 222 C 2]

*Sheo Narain and Sohan Lal Kapur*—for Appellants.

*Balwant Rai*—for Respondents.

**Judgment.**—In this second appeal the first matter for decision is, whether the agreement on which the plaintiffs rely is not binding on the respondent committee, and the second whether, being unregistered, it is admissible at all. Now the value of the contract, which involved the supply by the respondent from time to time of water sufficient to fill a large public bathing tank, clearly exceeded Rs. 100 and such a contract is not binding on the Municipal Committee unless signed by the President or Vice President and one more member, or, in the event of delegation, by members to whom that function may have been delegated. In this case the contract has been signed by neither the President nor by the Vice-President nor by any member. The point, though raised at a late stage, is a legal

one, is patent on the face of the record and is fatal to the plaintiffs' action. Again, the agreement which the committee deny as admissible contains as unmistakable disclaimer by both parties that either has any proprietary interest in the immovable property referred to in the contract. We find no force in the argument that S. 17, Registration Act, does not apply where it is doubtful whether any title existed in the declarants. The title in the tank was not free from dispute, and in these circumstances we hold that a declaration by a person that he holds no title in immovable property of Rs. 100 in value requires registration and if it is unregistered, it cannot be received as evidence of any transaction affecting such property.

For these reasons we dismiss the appeal with costs.

R.M./R.K. *Appeal dismissed.*

### A. I. R. 1919 Lahore 222 (2)

LEROSSIGNOL AND WILBERFORCE, JJ.

*Kaju Mal and others*—Defendants—Appellants.

v.

*Salig Ram*—Plaintiff—Respondent.

First Appeal No. 1439 of 1915, Decided on 30th January 1919, from decree of Senior Sub-Judge, Kangra, D/- 26th February 1915.

(a) Punjab Pre-emption Act (1905), S. 3 (1) and (2)—Tea factory situated outside village is not liable to pre-emption.

A tea factory built outside the limits of a village site is not liable to pre-emption either as agricultural land or as village immovable property. [P 224 C 2]

(b) Punjab Pre-emption Act (1905), S. 3 (1) and (2)—Natural forest outside limits of village is not liable to pre-emption not being agricultural land.

A stretch of natural forest which does not lie within the village site is also exempt from pre-emption, as it is not agricultural land nor land used for purposes subservient to agriculture. [P 224 C 2]

(c) Punjab Pre-emption Act (1905), S. 3 (1) and (2)—Tea garden is agricultural land and is liable to pre-emption.

A garden is a plot of land devoted to the production of herbs, fruits, flowers and vegetables, and as tea does not fall under any of these heads, a tea garden is not a garden but is agricultural land and is liable to pre-emption. [P 225 C 1]

(d) Pre-emption—Suit for—Waiver of right—Person entitled to pre-empt congratulating purchaser and joining entertainment given on occasion—Conduct does not amount to waiver.

Where a person, having a right of pre-emption, congratulates a vendee upon his purchase and joins in an entertainment given by the vendee



on that occasion, such conduct does not amount to a waiver by that person of his right.

[P 225 C 1, 2]

(e) **Pre-emption—Suit for—Notification of Government restricting right of pre-emption in certain area has no retrospective effect.**

A notification of the Government restricting the right of pre-emption in a certain area cannot be regarded as having retrospective effect, so as to deprive a person of the right to pre-empt which he possessed prior to the issue of the notification but which from the date of the notification is taken away.

[P 225 C 2]

(f) **Pre-emption—Suit for—Suit for pre-emption of building used as factory—Plaintiff must also sue for machinery therein.**

Where a plaintiff claims to assert a right to pre-empt a building used as a factory, he is not at liberty to omit to sue for the machinery therein as these are fixtures and form an integral part of the factory. A deliberate exclusion of the machinery fixtures would involve a dismissal of the suit.

[P 227 C 2]

(g) **Pre-emption—Right of—Right is invidious—Person enforcing right must observe all restrictions laid down.**

The right of pre-emption is a very invidious right which constitutes an invasion of the principle of free contract, and the party who comes into Court to enforce that right must be careful to observe all the restrictions within which that right is hedged.

[P 227 C 1, 2]

*Beechey, Santanam, Sohan Lal and Govind Das*—for Appellants.

*Muhammad Shafi, Tek Chand, Brij Lal and Mehr Chand*—for Respondent.

**Judgment.**—The property with which this pre-emption suit is concerned is a part of the Gopalpur Tea Estate, which was formerly owned by the Kangra Valley Tea Company. In 1912 after some dispute between Kaju Mal and Diwan Daya Kishen Kaul, who were rival purchasers, the Gopalpur Tea Estate was sold to Kaju Mal, defendant, for Rs. 97,000 and on the 1st October of that year the plaintiff, who is a Brahmin agriculturist of Jia, instituted the present suit for pre-emption of a portion of the estate sold, namely, an area of 10,524 kanals 8 marlas situate in Mauzas Gopalpur, Jia and Dadh Uparla as well as buildings situate in Mauza Gopalpur on payment of Rs. 50,000 or any other price that might be fixed by the Court. The residue of the area included in the sale was not included in the suit, inasmuch as plaintiff had no right of pre-emption in respect of those areas but in order to meet any objection on the part of the vendee that the residue of the tea areas by themselves would be of no value, the plaintiff offered to take over the whole of the area sold—an offer which was not accepted by the vendee. The Senior

Subordinate Judge granted the plaintiff a decree for possession of the area in suit on payment of Rs. 75,000, holding that the property in suit was either agricultural land or village immovable property within the meaning of S. 3, Pre-emption Act 2 of 1905, that the plaintiff had not acquiesced in the sale to the vendee to a degree that amounted to waiver of his right to pre-empt and finally that the plaintiff had from the first included in his claim the fixed machinery of the tea factory. The defendant vendee has appealed to this Court and on his behalf the points urged before us have been:

*Firstly*, that the suit could not proceed, inasmuch as the plaintiff excluded from his claim the working machinery of the factory which must be regarded as a fixture; *Secondly*, that a tea garden is not agricultural land; *Thirdly*, that a portion of the area included in the sale was a natural forest, namely, the Ban Jia forest, which cannot be classed as agricultural land; *Fourthly*, that the factory buildings are not village immovable property inasmuch as they do not stand on the village site. *Fifthly*, that the plaintiff had waived his right to pre-empt; *Sixthly*, that by the Punjab Government Notification No. 4662, dated 6th March 1916, the right to pre-empt in the Kangra District had been confined to the lineal heirs and collateral heirs of the vendor and therefore plaintiff had no right to pre-empt; and *Finally*, that the Senior Subordinate Judge had made a serious mistake in calculating the value of the area in suit and that if a decree in favour of plaintiff was to be maintained, the price to be paid by him should be not less than Rs. 85,000.

We shall deal first with the argument that the property in suit is not liable to pre-emption, and in this connexion it must be borne in mind that the law applicable to the case is not the present Pre-emption Act of 1913 but the Punjab Act 2 of 1905, which was the law in force at the time of the sale to the vendee defendant. Prior to 1905 the law of pre-emption was contained in Act 4 of 1872 and under that Act the right of pre-emption extended if the property concerned lay within a village, to the village site, to the houses built upon the village site and to all lands within the village boundary. It is not clear that the right of pre-emption under that Act extended to



buildings erected upon lands within the village boundary but not on the village site, although no doubt the sites of such buildings would have been liable to pre-emption. In the Act of 1905 it was laid down that the right of pre-emption should mean the right to acquire agricultural land or village immovable property in cases affecting sales in a village, and definitions were given in the Act of the terms "agricultural land" and "village immovable property." Agricultural land was defined to be "land" as defined in the Punjab Alienation of Land Act, 1900. whilst village immovable property was defined as immovable property within the limits of the village site other than agricultural land. Now, the definition of land in the Punjab Alienation of Land Act, 1900, is as follows:

"Land" means land which is not occupied as the site of any buildings in a town or village and is occupied or let for agricultural purposes or for purposes subservient to agriculture or for pasture, and includes the sites of buildings and other structures on such land."

The framers of the Act of 1905 appear to have been under the impression that the categories "agricultural land" and "village immovable property" exhausted all possible forms of property in a village, i. e., that there could be in a village only village immovable property and agricultural land, but they failed apparently to perceive that buildings erected outside the limits of a village site on land not occupied for agricultural purposes would not fall within either definition. Consequently on behalf of the appellant it has been urged that the factory buildings are admittedly not within the village site. They are not erected on agricultural land or on land occupied for purposes subservient to agriculture or for pasture and therefore they are not liable to be pre-empted. For the respondent-plaintiff it has been argued that the meaning of "village site" in the Pre-emption Act of 1905 is not the village abadi but the superficial area of the whole village including its lands. In other words, the contention is that in S. 3, sub-S. (2), Punjab Pre-emption Act of 1905, the expression "within the limits of village site" has been employed as synonymous with "within the village boundary." If that were true, it would be strange that the legislature in 1905 should have used the term "the

village site" in a sense different from that in which it is used in the Act of 1872 which was at that time under revision, and that they should have discarded the term "village boundary" which already existed in the Punjab Laws Act of 1872 and was ready to their hands. The term "village site" in the Punjab is a very well known expression of frequent occurrence denoting that portion of the village area which is not used for agricultural purposes but on which the habitations of the villagers are placed.

In the Punjab there are as a rule no homesteads as in European countries, but from time immemorial, no doubt, for purposes of protection, villagers have congregated on one central spot within the village boundary and have there constructed a compact village generally of a rectangular or roughly circular shape, the doors of the houses of which rarely, if ever, open upon the outside wall. The legislature in 1905 in defining the property in a village which was pre-emptible may have made a mistake, but with the intention of the legislature we are not concerned. We have to administer the law as we find it and in the present case we hold that the factory, whether it constitutes a *casus omissus* or whether such property was deliberately excepted from the operations of the Act, is not liable to pre-emption as village immovable property. The next point is whether the land under the factory can be said to be employed for purposes subservient to agriculture. Although fields planted with tea bushes are, we have no doubt, fields used for agricultural purposes, we cannot hold that a factory in which the produce of those fields is subjected to certain processes which fit it for human consumption and the markets of the world can be said to be subservient to agriculture.

The building or land can be correctly said to be subservient to agriculture when it directly promotes agriculture, e. g., a building in which agricultural cattle or agricultural implements or stores are sheltered is directly subservient to agriculture because the property it shelters is used in the actual operations of agriculture; but a tea factory merely deals with the product of agriculture and is no more subservient to the production of tea than a whisky distillery in Aber-



deen is subservient 'to agriculture, say, in Canada which produces the barley from which the whisky is distilled. From this it follows that the factory we are now dealing with is not pre-emptible either as agricultural land or as village immovable property. It is true that intermingled with the other factory building there must be some huts used by the labourers who actually work in the tea fields or garden; but the point has not been urged before us, nor is there anything on the record to indicate which of the buildings included in the suit are factory buildings proper and which are the buildings inhabited by the workers on the land, and we are unable to discriminate between the two categories. Included in the area in suit is a stretch of natural forest land known as Ban Jia. That area also we hold to be exempt from pre-emption, for it does not lie within the village site and it is not agricultural land nor land used for purposes subservient to agriculture or for pasture. It is forest land and the wood derived from it, it is admitted before us, has been used by the factory for fuel and for the manufacture of tea chests, whilst a small portion of its area consists of a slate quarry. With regard to the fields in suit in which tea is grown, it has been argued on behalf of the appellants that they are not agricultural land inasmuch as tea is grown not in fields but in a garden, but we do not think that because in general parlance a tea plantation is generally spoken of as a tea garden, it is not therefore agricultural land.

A tea garden is strictly speaking, not a garden, for a garden is a plot of land devoted to the production of herbs, flowers, fruits and vegetables, and tea falls under none of these heads. The term "agricultural land" is used in the Act of 1905 in its widest sense to denote all land which is tilled. Consequently if the plaintiff is to succeed, from his decree we must excise the factory buildings and the land under them and also the Ban Jia's forest. The appellants contention that the plaintiff waived his right to pre-empt was dealt with before us very briefly and lukewarmly and the arguments adduced amounted at most to this that the plaintiff had congratulated the vendee upon his purchase and had joined in the entertainment which the vendee gave on that occasion, and we

have no difficulty in agreeing with the Court below that this conduct on the part of the plaintiff does not amount to waiver. The next point was with reference to the Punjab Government Notification No. 4662, dated 6th March 1916, which, it was urged, had a retrospective effect. In support of this counsel referred to *Bishan Singh v. Ganda Singh* (1). That ruling was to the effect that a notification modifying the law of pre-emption, published after the date of the sale on which the right of pre-emptor accrued, annihilated that right. With all deference we are unable to follow that ruling, which not only attributes to a notification greater force than to a repealing Act, but proceeds upon the principle that in the absence of a provision to the contrary a notification has retroactivity. The next point taken was that in calculating the value of the property decreed, the learned Senior Subordinate Judge committed a serious mistake by failing to observe that the Lahla and Chachian lands for which the plaintiff did not sue are very inferior lands, further, that in making his calculations the Senior Subordinate Judge had compared the tea lands in suit with the whole of the land excluded from the suit which comprised a large area of banjar qadim or waste land. The Senior Subordinate Judge appears to have had considerable difficulty in deciding this question, for we note that this decision is based mainly on conjecture and we are surprised that he did not adopt the method of comparing the revenue assessed on the areas included in the suit and that on the area excluded from it. In this respect this Court has received very little aid from counsel; the respondent however expressed his indifference if the price to be paid by the plaintiff were enhanced from Rs. 75,000 to Rs. 77,000, whilst the appellant pressed for Rs. 85,000.

After exclusion of the Ban Jia forest we find that the land in suit is as nearly as possible  $\frac{2}{3}$  of the whole area sold whilst the residue is of course  $\frac{1}{3}$ , but it will be observed that whilst the waste in the area in suit is only 1,180 kanals, in the area not in suit it amounts to 1,860 kanals. It is unfortunate that we do not know the assessment of the areas not comprised in the suit, but we do not think we should remand on that account

(1) [1912] 10 P. R. 1918=16 I. O. 959.



only. The appraisement of buildings and machinery at Rs. 17,000 and of the Ban Jia forest at Rs. 14,000 has not been challenged in this Court, so that Rupees 66,000 as decided by the trial Court may be taken as the price of the lands sold, and if the 2/3rd and 1/3rd proportion be applied, the price payable by plaintiff will be Rs. 44,000 but whilst retaining that proportion as a rough guide, we think that there should be some enhancement in view of the un rebutted evidence that the Lahla and Chachian tea lands are inferior, of the fact that the waste in the excluded area instead of being in the proportion of 1 to 2, is in the proportion of about 1 1/2 to 1, and of the principle that nothing should be presumed in favour of the pre-emptor, and we hold that Rs. 49,000 is a fair price for the lands in suit. The last point in the case is whether the plaintiff's suit deserves to fail because he refused to sue for the pieces of machinery which were fixtures in the factory, although he asserted a right to pre-empt the factory and therefore failed to claim the whole bargain up to the limit of his right to pre-empt. In this connexion it will be necessary to refer to the plaint and pleadings in the case. The plaint opens with a table giving the areas of the lands in suit and under items 13 and 14 are shown two engine houses and the question for decision is, whether in suing for those engine houses the plaintiff intended to sue for the engines and machinery set up in them. In Cl. 2 (a) of the plaint the property in suit is described as situated in certain villages and its detail is said to be given in certain lists. In Cl. 2 (b) of the plaint it was alleged that the above property mentioned in Cl. 2 (a) as also machinery, implements and other moveable articles were the property of the vendor. In Cl. 2 (g) of the plaint the plaintiff alleges that he has no right of pre-emption in respect of the whole property, but that he has such a right in respect of the property mentioned in Cl. (a) which he valued at Rs. 50,000. The plaint then proceeds:—

"The remaining property of the villages Chachin and Lahla, as also machinery, implements, goods tea and other moveable articles at villages Gopalpur, Jia and Dadh Uparla, in respect of which the plaintiff has not got a right of pre-emption, are worth Rs. 47,000."

From the plaint then it is clear that the plaintiff excepted from his claim

machinery and implements on the ground that he had no right of pre-emption in respect of them. This plaint was presented to the Court on 1st of October 1912. At p. 236 of the paper-book will be found the preliminary objections filed by the vendee dated 4th of January 1913.

On that date in the presence of the plaintiff the vendee protested that as the plaintiff did not claim the machinery which was set up in the houses, his suit for a part of the property sold could not proceed. Neither on that date nor on 6th of January did the plaintiff take any steps to meet his objection. Again on 22nd of January 1913 the vendee defendant filed full pleas, in which he urged that the machinery fixtures had not been included in the suit. Again on 8th of February other defendants in the case put in the same objection in the presence of the plaintiff's agent and pleaders, and on that date issues were struck by the Court and from those issues it appears that even on that date the parties were still at issue on the point whether machinery should be included in the value of the houses, for an issue in that sense was struck and the onus placed on the defendant. Not only that, but another issue, 7, was struck as to the market-value of the houses in suit. The 15th of March was fixed for evidence on these issues, but nothing was done on that day and the 28th of April was the date to which the hearing was adjourned. On that adjourned date however nothing was done except that the words "with machinery" were interpolated in issue No. 7, so that the issue then ran:

"what is the market value of the houses with machinery in suit?"

Even at that stage, however, the plaintiff was anxious to avoid the decision of the issue whether the machinery should be included in the value of the houses and on 1st May 1913 he presented an application to the Court requesting that issue No. 8 should be struck out, inasmuch as it was alleged to be unnecessary. It was obviously not unnecessary, for even though the Court knew the value of the houses with machinery in suit, it would still have to determine whether the value of the machinery was to be excluded in determining the price to be paid by plaintiff. On 30th May no evidence was taken, but on 25th June another protest had been put in on behalf of minor de-



endants with regard to the omission of plaintiff to sue for the machinery which was a fixture. The 12th July was then fixed for evidence, whereupon on behalf of the plaintiff his Counsel asserted that the machinery and implements which were excluded from the suit were a heap of old machinery lying near the godown and it was further stated that the fixture machinery had been from the first included in the plaint, but even if the Court held that the plaint did not include the working machinery, the suit was still pressed for the land and houses without machinery. No application on behalf of the plaintiff was made to amend the plaint and the suit proceeded on the original plaint.

Now, the question which we have to decide is whether the plaintiff from the outset was suing for the fixture machinery and even if he was not whether that circumstance should be held fatal to his claim. On behalf of the appellant vendee it is urged that the omission to sue for the machinery was deliberate because the plaintiff was not anxious to purchase second hand machinery and because he hoped, if successful, to purchase it for a song, knowing that the defendant would find it more profitable to part with it at a loss rather than to take it down and remove it. For the respondent-plaintiff it is urged that the value of the machinery was so small an item (it has been valued at Rs. 5,000) that it is incredible that the plaintiff would have deliberately omitted it; that if he did omit through inadvertence or mistake of law, he had declared his intentions in time and his original mistake had been cured. With regard to the explanation given by plaintiff's Counsel on 12th July 1913, we are of the opinion that the statement that the machinery excluded from the suit was a heap of old rubbish was quite incorrect. It is true that there was some discarded machinery lying outside the factory, but that machinery was not mentioned in the deed of sale and it is obvious from the whole wording of the plaint that that discarded machinery was not the machinery referred in Cls. 2 (b) and 2 (g) of the plaint. Now the right of pre-emption is a very invidious right which constitutes an invasion of the principle of free contract, and the party who comes into Court to enforce that right must be careful to observe all

the restrictions within which that right is hedged. We need not go to the length of assuming that the plot ascribed by the appellant's Counsel to the plaintiff is true, but it seems to us that plaintiff's Counsel in drawing up the plaint made a mistake of law in supposing that his client was entitled to sue for the factory and at the same time exclude the machinery fixtures. It is sufficient for us to say that the machinery fixed in the houses was deliberately excluded from the plaint probably under the mistaken notion that it was no integral part of the factory and as the plaint was never subsequently amended, it was defective.

Had the plaintiff honestly recognized his mistake, and admitted that he had omitted to sue for the machinery and had he prayed to amend, this concession might well have been granted to him but we do not think he should have been allowed to succeed on a plaint which excludes the machinery, on a false allegation that the machinery was included ab initio in the claim. Had then the first Court dismissed the suit on the preliminary ground that plaintiff alleged in his plaint a right to sue for the factory but refused to include the machinery in his suit that order of dismissal would have been justified. As however we hold that the plaintiff had no right at all to sue for the factory, we do not think it would be right to dismiss the suit on that ground at this stage, though the matter is one to be borne in mind when costs are being allotted. In view of the foregoing we accept the appeal and modify the lower Court's decree by decreeing to plaintiff the properties in suit, less the factory buildings and compound and the Ban Jia forest, on payment into Court within two months of Rs. 49,000. If Rs. 49,000 are paid as above provided, parties shall bear their own costs throughout if not the suit shall stand dismissed with costs throughout.

R.M./R.K. *Appeal Partly accepted.*

**A. I. R. 1919 Lahore 227**

BROADWAY, J.

*Shankar Sahai*—Complainant—Petitioner.

v.

*Emperor*—Opposite Party.

Criminal Revn. No. 959 of 1918, Decided on 30th October 1918, from order of Sub-Judge, Sahapur, D/: 12-8-1918.



**Criminal P. C. (1898), S. 250—Trial under Ss. 467 and 406, I. P. C.**—In trial under S. 467 no compensation could be awarded by Magistrate exercising powers under S. 30, Criminal P. C. and in trial under S. 406 compensation of more than Rs. 50 cannot be awarded.

In discharging a person accused of offences under Ss. 406 and 467, Penal Code, the Magistrate, with powers under S. 30, Criminal P. C., directed the complainant to pay to the accused Rs. 100 as compensation :

*Held* : that in respect of the offence under S. 467, which was triable by a Court of Session, the Magistrate had no jurisdiction to award compensation, and that in regard to the offence under S. 406 the amount of compensation could not exceed Rs. 50 under S. 250. [P 228 C 1, 2]

*Ram Chand*—for Petitioner.

**Grounds.**—The applicant Shankar Sahai lodged a complaint against Gian Chand under Ss. 406 and 467, Penal Code, and the District Magistrate, having in view the fact that S. 467 was triable by the Court of Session, made it over to Khan Sadullah Khan, a S. 30 Magistrate. The said Magistrate held an enquiry into the case and discharged Gian Chand, holding that the charge brought by Shankar Sahai was malicious and vexatious. He called upon the latter to show cause why he should not be made to pay compensation to the former. Shankar Sahai's explanation having been considered unsatisfactory, the Magistrate ordered him to pay Rs. 100 to Gian Chand. In awarding this compensation the Magistrate has acted under S. 250, Criminal P. C. Shankar Sahai has put in this application for revising the Magistrate's order. He says that on the merits his complaint was bona fide and that legally the Magistrate's order for compensation is defective inasmuch as he, as a S. 30 Magistrate, could not have recourse to S. 250, Criminal P. C.

The counsel of the parties have argued the case before me. So far as the merits are concerned, I think the Magistrate was quite justified in dismissing the complaint. But I do not see that his order for compensation of Rs. 100 is at all correct. S. 250, Criminal P. C., does not provide for compensation exceeding Rs. 50. For lodging a complaint under S. 467, Penal Code, which is triable by a Court of Session, the Magistrate could award no compensation whatever, vide *Crown v. Hamir Chand* (1) and *Crown v. Qadu* (2). He was, of course, justified to

take an action under S. 250, Criminal P. C., so far as S. 406, Penal Code, noted in the complaint was concerned, but in that case too the amount awarded should not have exceeded Rs. 50. This is no doubt an illegality which should be set right. Under the provisions of S. 438, Criminal P. C., the matter is reported to the Hon'ble Judges for such orders as they may deem fit. The records of the case are submitted herewith.

**Order.**—Agreeing with the reference of the Sessions Judge I alter the compensation payable to the sum of Rs. 50 only.

R.M./R.K.

*Petition accepted.*

## A. I. R. 1919 Lahore 228

RATTIGAN, C. J.

*Bhana and others*—Plaintiffs—Appellants.

v.

*Bela Singh and others*—Defendants—Respondents.

Second Appeal No. 1150 of 1916, Decided on 31st May 1918, from decree of Dist. Judge, Jullundur, D/ 4th February 1916.

**Contract Act (1872), S. 13—Contract of exchange by minor is void—Transfer of Property Act (1882), S. 6.**

A contract of exchange of land made by a minor is void and as such cannot possibly be ratified in law. [P 229 C 1]

*Badraddin Kureshi*—for Appellants.

*Brij Lal*—for Respondents.

**Judgment.**—It appears that on 6th December 1913 and 10th December 1913 Bhana, plaintiff 1, who was then himself a minor, aged 17, acting on behalf of himself and purporting to act as the guardian of his minor brothers, effected certain exchanges of lands with the defendants. Mutations followed and it is stated that at the mutation, which took place on 26th June 1914, when Bhana had attained the age of majority, Mt. Rami, the mother of the plaintiffs, was also present and that both she and Bhana ratified the transactions that had already taken place. Plaintiffs, who are Bhana himself and his two minor brothers, have now sued for possession of the land originally belonging to them, and ask to have the parties restored to the status quo. The first Court held that the transactions effected by Bhana were void, that the exchanges were not beneficial to the minors and that the defendants, who had built on the land in defiance of an injunction from the Court, were not entitled to any

(1) [1902] 14 P. R. 1902 Cr.

(2) [1902] 26 P. R. 1902 Cr.



compensation for their buildings. He accordingly granted plaintiffs the decree for which they prayed. On appeal the District Judge reversed the decree and dismissed the plaintiffs' suit with costs throughout.

The grounds upon which the learned District Judge based his judgment were that Bhana at the time of the transactions was "quite old enough to know what was to his advantage and to that of his younger brothers," and that the latter were represented at the second mutation by their mother, and further that the exchanges had been beneficial to the plaintiffs who had received chahi land in lieu of banjar gadim. Plaintiffs have preferred a further appeal to this Court and in my opinion their appeal must succeed. The contract of exchange made by Bhana, a minor, was void, and as such could not possibly be ratified in law (see Pollock and Mulla's Contract Act, Edn. 3. pp. 56 and 58). The authority relied on by the District Judge, namely, *Roy v. Thakur Ram Jiwan Singh* (1) is not in point. In that case it was held that a person who at the time of contracting was under a disability under the provisions of the Chota Nagpur Encumbered Estates Act, 6 of 1876, but was at the point of emerging from that disability could ratify his contract after the disability had ceased. That case was thus decided with reference to its own particular facts and to the provisions of the Act referred to. The disability was one under the terms of that Act, and not a disability due to minority. On the other hand we have now the authority of their Lordships of the Privy Council for the proposition that the contract by a minor is not merely voidable, but is wholly void see *Mohori Bibee v. Dharmodas Ghose* (2). Such being the case, it was not competent either to Bhana or to Mt. Rami to ratify an act which from its very inception had no legal force.

I accordingly accept the appeal and setting aside the order of the District Judge I remand the appeal to the Court below for determination of the question whether any compensation is due to defendants for the building erected by them. The question was put in issue (issue 6) and decided against defendants by the first Court, but it was raised be-

fore the lower appellate Court in the defendants' seventh ground of appeal and upon the view I take of plaintiffs' right to have the exchanges set aside, it must be considered and decided by the District Judge. I accordingly direct that the record be returned to the Court of the District Judge for final determination of defendants' appeal in accordance with law and subject to the foregoing remarks. I leave it to the District Judge to deal with the question of costs.

R.M./R.K.

*Appeal accepted.*

### A. I. R. 1919 Lahore 229

BROADWAY, J.

*Ahsan Ali*—Convict—Petitioner.

v.

*Emperor*—Opposite Party.

Criminal Revn. No. 815 of 1918, Decided on 11th September 1918, from order of Sess. Judge, Montgomery, D/- 2nd July 1918.

Penal Code (1860), S. 223—Negligence of accused must be established, and also that escape was natural and probable cause of his negligence.

Before a person can be convicted under S. 223 it must be shown not only that he was guilty of negligence but that the escape was at least the natural and probable consequence of his negligence.

Accused a jail warder was placed in charge of a gang of prisoners and sent off to do agricultural works. Contrary to his orders he permitted a convict warder to take two of the convicts to the cemetery to water the trees there. The cemetery was at some distance and not within sight nor did the accused attempt to patrol in that direction. Owing to the negligence of the convict warder one of the convicts escaped:

*Held*: that the accused was guilty of an offence under S. 223. [P 230 O 1]

*Ram Lal*—for Petitioner.

*Mul Chand*—for the Crown.

**Judgment.**—Ahsan Ali, son of Najib Khan, has been convicted of an offence under S. 223, I. P. C., and sentenced to six months' simple imprisonment. His appeal to the Sessions Court having been rejected he has moved this Court on the revision side and on his behalf I have heard Mr. Ram Lal, while Mr. Mul Chand has addressed me on behalf of the Crown. The facts are simple and are as follows: Ahsan Ali, who was a warder in the Montgomery Jail, was placed in charge of a gang of prisoners and sent off to do agricultural work. The gang consisted of 15 prisoners and seven convict warders. Among them was Labh Singh, a convict warder, and Tagia or Tagra, a convict. Under the rules (Jail Manual,

(1) [1906] 83 Cal. 868.

(2) [1903] 80 Cal. 539=80 I. A. 114 (P. O.).



R. 386-H) it was the duty of Ahsan Ali to so place the gang that the convicts while working were within sight of his convict warders or himself and further he was bound to patrol from time to time in case any were not in his own view. He however permitted Labh Singh to take Tagia and another convict named Fazla to the cemetery in order to water the trees there. This cemetery was at some distance and not within sight, nor apparently did Ahsan Ali attempt to patrol in that direction. Under the rules, it was urged when a convict or convicts are sent away on any special work it is sufficient to send them in charge of a convict warder. To this extent it is clear Ahsan Ali complied with the rules, as Labh Singh was in charge of Tagia and Fazla. Labh Singh, however instead of keeping his eye on his convicts acted negligently and Tagia made off. For this escape Labh Singh and Ahsan Ali have both been held responsible and punished under S. 223, I. P. C. Labh Singh did not appeal and the question now is whether the conviction of Ahsan Ali is warranted. He has been found to have been guilty of negligence in that he allowed Labh Singh and the two convicts to separate from his gang and go to the cemetery, though he had had no orders to do anything in that place. His gang was the "agricultural" gang and it was his duty to see that the convicts were employed on that work.

His explanation is that after he had taken his gang out to work Labh Singh asked for men to be sent to the cemetery. He refused as the jailor had not said anything about the cemetery. A gang had however been at work there some 10 days previously repairing the walls and watering the trees and when Labh Singh said that the jailor had told him that the trees were to be watered he believed him and sent the men as stated above. As a matter of fact the jailor denies having given such orders to Labh Singh. It is clear that in allowing Labh Singh to take the two convicts to the cemetery Ahsan Ali acted against his orders which were to take his gang for agricultural work. It is also fairly clear that he did this relying on Labh Singh's statement. Further there is no suggestion that he ever attempted to patrol in the direction of the cemetery which was too distant to permit him to keep the three men in

eight. There can be no doubt that he acted negligently, that is without due care and caution when he accepted Labh Singh's assertion without any attempt at verifying his statement by reference to the jailor. It was however urged by Mr. Ram Lal that the escape of Tagia was too remote a consequence of the petitioner's act and my attention was drawn to *District Magistrate of Nellore, In re* (1) and *Durga Prasad v. Emperor* (2). In *District Magistrate of Nellore, In re* (1) it was found that contrary to the orders of the Magistrate a prisoner was marched after sunset and rescued in consequence. The negligence lay in marching the prisoner after sunset in contravention of the Magistrate's directions and it was held by the Madras High Court that as there was no evidence that there was any reason to expect that any attempt would be made at a rescue no offence under S. 223, I. P. C., had been made out.

I do not think that this case can afford the petitioner any assistance, for here there is no question of a rescue. In *Durga Prasad v. Emperor* (2) it was held by the Allahabad High Court that before a person can be convicted under S. 223, I. P. C., it must be shown not only that he was guilty of negligence but that the escape was at least the natural and probable consequence of his negligence. In this view I agree. The facts of that case were these: A police officer in charge of a thana had been ordered to send certain prisoners to a certain place. He went out on some other work leaving orders with Head Constable to send the prisoners off. The Head Constable complied but the prisoners escaped from the custody of those sent in charge of them. It was sought to hold the officer in charge of the thana criminally responsible for the escape. There seems to be no doubt that he could not be so held. Mr. Ram Lal contended that the position of his client is similar to that of the police officer inasmuch as he had placed Labh Singh in charge of Tagia. I do not however think that his contention is correct, for in the present case Ahsan Ali was negligent in allowing Labh Singh's party to go to the cemetery and was further negligent in that he made no attempt to supervise them in any way. Even assuming

(1) [1909] 10 Cr. L. J. 293=3 I. C. 460.

(2) [1910] 11 Cr. L. J. 478=7 I. C. 411.



that his first act of negligence was too remote it seems to me his further negligence must be regarded as connected with the escape sufficiently closely to warrant his conviction under S. 223, I. P. C. Mr. Mul Chand referred me to *Ghulam Ali v. Empress* (3), but the facts of that case are very different and it cannot afford any assistance. The question of sentence remains—it seems to me that six months is too heavy a punishment in the circumstances of the case.

There can be no doubt that Ahsan Ali acted in an honest belief that Labh Singh's statement was true. The fact that till recently Labh Singh had been working at the cemetery lent colour to the statement and I consider that these circumstances mitigate his offence. I consider that a sentence of three months' simple imprisonment will meet the case and as he has already undergone that term approximately, I reduce the sentence to that already undergone and direct his release.

R.M./R K. Sentence reduced.

(3) [1884] 19 P. R. 1893 Cr.

### A. I. R. 1919 Lahore 231

SCOTT-SIMTH AND DUNDAS, JJ.

*Sri Ram*—Defendant—Appellant.

v.

*K. Sorabji*—Plaintiff—Respondent.

Misc. First Appeal No. 818 of 1917, Decided on 3rd May 1919, from order of Sr. Sub.-Judge, Lahore, D/- 1st March 1917.

(a) Civil P. C. (1908), Sch. 2, Para. 17—Agreement to refer—Refusal of one arbitrator to act—Provision authorising appointment of another—Agreement is not incapable of performance.

An agreement to refer a dispute to arbitration does not become incapable of performance by the refusal of one of the arbitrators to act, where there is a distinct provision authorising a party to appoint another arbitrator in his place. 44 I. C. 866, *Dist.* [P 23 C 2]

(b) Civil P. C. (1908), Sch. 2, para. 17—Failure of arbitrators to give award within specified time—Agreement can be filed in Court.

The mere fact that the award is not given within a specified time is not a sufficient reason for refusing to file the agreement in Court, specially where there is a provision in the agreement allowing an extension of time. [P 292 C 1]

*Moti Sagar*—for Appellant.

*Shamair Ohand* and *Bhagat Govind Das*—for Respondent.

**Judgment.**—This is an appeal from an order of the Senior Subordinate Judge of Lahore under Cl. (17), Sch. 2, Civil

P. C., directing that an agreement to refer to arbitrators be filed in Court. The agreement is printed at pp. 3 to 6 of the paper book. Rai Moti Sagar on behalf of the defendant appellant has raised four points in arguing the appeal: (1) That one of the arbitrators Lala Mul Chand named in the agreement having declined to act, the agreement cannot be made a rule of Court; (2) that the award was to be given within a month of the arbitrators entering upon the reference [Cl. 6 (ii) (b) of the agreement and that as it was not filed within that time, the agreement has become inoperative; (3) that plaintiff-respondent has not carried out the stipulation entered in Cl. (3) of the agreement, and therefore is not entitled to ask that it should be filed in Court; (4) that the letters of the 12th and 13th June (pp. 8—11 of the paper-book) should in any case be filed along with the agreement.

In support of the first point counsel relies upon *Mohan Lal v. Damodar Das* (1), which followed the case reported as *Ma Ba U v. Mauny P Lan* (2). It was held there that an agreement to refer the matter in dispute to several specified arbitrators becomes incapable of performance when one of those arbitrators dies, and if such death takes place before an application is made under Cl. 17, Sch. 2, Civil P. C., this is sufficient reason for refusing to file the agreement in Court and the Court could not make an order of reference under Sub-Cl. (4) of the said clause. In the present case however there is a distinct provision see Cl. 6 (ii) (b) of the agreement that in case of disability, resignation or death of any arbitrator, the party which had selected such arbitrator would be competent to appoint another in such arbitrator's place. It is stated in the present case that one Ram Richhpal has been appointed as arbitrator in the place of Mul Chand, but whether this be so or not, it is clear that some one can be appointed in Lala Mul Chand's place, and therefore it cannot be said that the agreement to refer the dispute to certain arbitrators has become void and of no effect. No doubt, if the agreement was to refer to certain specified arbitrators, one of whom died or resigned, and there is no provision for appointing anyone in his place,

(1) [1918] 71 P. R. 1918=44 I. O. 866.

(2) [1917] 42 I. O. 911.



then the agreement would become void and the decision reported as *Mohan Lal v. Damodar Das* (1) would be in point. Under the circumstances of the present case however we hold that the agreement has not become void by reason of the resignation of Lala Mul Chand.

With regard to the second point, it was no doubt provided that the arbitrators should make their awards in writing within one month after entering upon the reference or after having been called upon to act by notice in writing by any party to the submission or on or before any later day to which the period for making the awards had been enlarged. Now it does not appear to us that any notice in writing was given within the meaning of clause 6 (ii) (b) of the agreement. Attempts were made to get the arbitrators together and they were got together in Lahore towards the end of October 1915, but there is evidence on the record to show that they never entered upon the reference within the meaning of the agreement. Lala Mul Chand (p. 30 of the paper-book) says: "I did not begin arbitration proceedings." Again at p. 32, line 23 Rai Bahadur Lala Narsingh Das, one of the arbitrators, states:

"We did not begin the proceedings for which we were appointed arbitrators, but we made new proposals to bring about a compromise."

At line 33 of the same page he says:

"The parties did not press for the beginning of proceedings for award on the original agreement and they were pleased with the new proposals."

The third arbitrator, Nussarwanji Jamsaji's statement will be found at p. 36 et seq. In his answer to question No. 12 of the interrogatories (p. 39) he no doubt says:

"We entered upon the reference in about end of October 1915."

but on p. 41 in answer to question No. 25 he states:

"We were working as mediators and not as arbitrators. We were doing our best to bring about settlement with the consent of both parties."

From the above it is quite clear that the arbitrators never entered upon the reference but merely tried to make the parties agree to some terms proposed by them. In any case we think that the mere fact that the award was not given within a month of the arbitrators entering upon their duties would not be a sufficient ground for refusing to file the agreement in Court, especially in view

of the provision in the agreement that the period within which the award might be made could be extended. With reference to the third point, the plaintiff has not supplied Rs. 40,000 worth of wines and liquors as stipulated in clause (3) of the agreement. We do not consider that this would be any reason for not filing the award. The duty of the arbitrators in respect to wines and liquors supplied was that in case of a dispute as to their value they were to make an award on the point. Some Rs. 25,000 worth of wines and liquors are said to have been supplied and the arbitrators can make an award as to the value of these. As to the fourth point, we consider that there was no necessity to file the letters in question in Court. These letters contained proposals prior to the agreement which was based upon and superseded them. The last clause of the agreement is that the points not expressly herein or hereinafter referred in writing to arbitration by both parties shall not be adjudicated upon by the arbitrators or the umpire. This shows that the agreement is conclusive and supersedes all previous agreements. We are therefore of opinion that there is no force in Mr. Moti Sagar's contentions and that the lower Court's order filing the agreement in Court is correct. The appeal fails and is dismissed with costs.

R.M./R.K. *Appeal dismissed.*

### A. I. R. 1919 Lahore 232

SHADI LAL, J.

*Bishen Singh*—Plaintiff—Appellant.

v.

*Mt. Bishni and others* — Defendants—Respondents.

Second Appeal No. 1170 of 1918, Decided on 21st November 1918, from decree of District Judge, Ambala, D/- 18th October 1917.

**Pre-emption—Nature of right—Rights of vendee vest in pre-emptor—Vendor entitled to only portion of property sold—Pre-emptor is entitled to proportionate abatement in price.**

A right of pre-emption is a right of substitution, and the pre-emptor steps into the shoes of the vendee in respect of all the rights and obligations in respect of the sale transaction. In the case of a sale of landed property where the vendor is found later to have owned only part, the purchaser, if he has acted bona fide, is not compelled to surrender the remnant portion of his purchase to a pre-emptor at a less sum than that which he paid for the entirety of his pur-



chase, if the purchaser elects to abide by his bargain and retain the residue at the amount he paid for the whole. [P233 C1]

*Nanak Chand*—for Appellant.

*Fakir Chand*—for Respondents.

**Judgment.**—This was a suit for the pre-emption of one-third share of a joint khata sold by Mt. Bishni to defendants 2 and 3 for Rs. 300. During the pendency of the pre-emption suit, the other cosharers in the khata brought a suit that the vendor was entitled to only one-ninth share, and not to one-third share, and obtained a decree in their favour. The contention on behalf of the pre-emptor is that, considering that he cannot get more than one-ninth of the joint holding, he is liable to pay not the price mentioned in the deed but only one-third thereof. To this contention I am unable to accede. It has been repeatedly held that the right of pre-emption is a right of substitution, and that the pre-emptor steps into the shoes of the vendee in respect of all the rights and obligations arising out of the sale transaction. Indeed, a judgment in *N. W. P. Sudder Dewani Adawlat*, 1863, at p. 394. lays down that

"in case of landed property, where the vendor is found later to have owned only part, the purchaser, if he had acted bona fide, is not compelled to surrender the remnant portion of his purchase to a pre-emptor at a less sum than that which he paid for the entirety of his purchase, if the purchaser elects to abide by his bargain and retain the residue at the amount he paid for the whole."

Mr. Nanak Chand for the appellant places his reliance upon an unreported judgment in Civil Appeal No. 1032 of 1906 which is to the effect that a condition in the deed of sale, by which the vendor guarantees his title in the land solely to the vendee and agrees to compensate the latter, if disturbed, is one which does not enure for the benefit of the pre-emptor. The learned counsel consequently argues that as his client is not entitled to bring a suit against the vendor for damages caused by the breach of the covenant of title, he should not be compelled to pay the whole price. In view of the nature of the right of pre-emption, I am doubtful whether that ruling should be regarded as sound law. At any rate, I do not think that there is any valid reason why I should not follow the decision of the Agra Court, which is directly to the point and lays down a principle which has my entire concurrence.

The learned counsel's prayer for the extension of time for the payment of money cannot be accepted. The appeal therefore fails, but, in view of the novelty of the point involved, the parties are directed to bear their own costs in this Court.

R.M./R.K.

*Appeal dismissed.*

### A. I. R. 1919 Lahore 233

SCOTT-SMITH, J.

*Kanhia Lal and others*—Judgment-Debtors—Appellants.

v.

*Bank of Upper India, Ltd. Delhi*—Respondents.

Misc. First Appeal No. 602 of 1918, Decided on 10th January 1919, from order of Dist. Judge, Delhi, D/- 24th January 1918.

(a) Civil P. C. (1908), O. 21, R. 66—Notice to decree-holder and judgment-debtor is necessary before proclamation.

Order 21, R. 66, requires a Court to draw up a proclamation of sale after notice to the decree-holder and the judgment-debtor. [P 234 C 1]

(b) Civil P. C. (1908), O. 21, R. 66—Order settling terms of proclamation is appealable.

The action of a Court in settling the terms of a proclamation under O. 21, R. 66, is a judicial act and is appealable: 37 I. C. 872, *Foll.*

[P 234 C 1]

(c) Civil P. C. (1908), O. 21, R. 66—Amount wrongly stated in proclamation—New proclamation should issue after amount has been corrected.

The legislature has laid down that a proclamation of sale shall contain certain particulars. One of these is that it shall state the amount for the recovery of which the sale is ordered. If the amount is wrongly stated the proclamation is a defective one, and a new proclamation should issue after the amount has been corrected.

[P 234 C 1,2]

*Ganpat Rai*—for Appellants.

*Santanam and Moti Sagar*—for Respondents.

**Judgment.**—This is an appeal by the judgment-debtors from the order of the District Judge of Delhi rejecting their application that a fresh proclamation of sale should be made under O. 21, R. 66, Civil P. C. Mr. Santanam on behalf of the decree-holder-respondent raises a preliminary objection that no appeal lies and in support of his contention refers to *Sivagami Achi v. Subrahmania Ayyar* (1), which was followed in *Deoki Nandan Singh v. Bansi Singh* (3). The Madras case dealt with proceedings of a Court under S. 287 of the former Code of Civil Procedure, which corresponds with O. 21.

(1) [1904] 27 Mad. 259.

(2) [1911] 10 I. C. 871.



R. 66 of the present Code. It was however pointed out by a Full Bench of the Patna High Court in the case reported as *Raghunath Singh v. Hazari Sahu* (3) that O. 21, R. 66, Civil P. C., differs from S. 287 of the Code of 1882 in that it requires a Court to draw up a proclamation of sale after notice to the decree-holder and the judgment-debtor. It was accordingly held that the action of a Court in settling the terms of a proclamation under O. 21, R. 66, is a judicial act. In the case reported as *Shiam Lal v. Roshan Lal* (4) a Division Bench of the Allahabad High Court held that some of the orders passed by an execution Court in proceedings under O. 21, R. 66, are decrees and appealable as such and that an order refusing to inquire into the valuation was an appealable decision. In the present case the proclamation was amended after notice was issued to the parties, but when the judgment-debtors asked that the amended proclamation should be published in accordance with law, their application was rejected. This was in my opinion, a judicial decision and appealable as such. The original proclamation stated that the amount for the recovery of which the sale was ordered was Rs. 6,511 odd. The proclamation issued on 24th December 1917, but on 16th January 1918 the decree-holder applied that it should be amended and that Rs. 7,603 odd should be entered as the amount due. The District Judge amended the proclamation on 22nd January and the sale was held on the 24th of the same month.

It is contended on behalf of the appellants that a new proclamation should have been made and published in accordance with Rr. 66 and 67, O. 21, Civil P. C. The legislature has laid down that a proclamation of sale shall contain certain particulars. One of these is that it shall state the amount for the recovery of which the sale is ordered. If the amount is wrongly stated it is clear that the proclamation is a defective one. When the amount has been finally settled the proclamation should then issue. If the amount has in the first instance been wrongly stated in the proclamation and it is subsequently corrected it is, I think, obvious that a new proclamation should issue. It is argued on behalf of the res-

pondent that the matter is quite immaterial, but I do not think that any matter can be said to be immaterial which the legislature has distinctly laid down shall be entered in the proclamation of sale. I therefore hold that the judgment-debtors were entitled to have a new proclamation issued, and I accordingly accept the appeal, and setting aside the order of the lower Court direct that a new proclamation shall issue in accordance with law and that the property shall be resold thereafter. Costs in this Court will be on the parties.

R.M./R.K.

Appeal accepted.

## A. I. R. 1919 Lahore 234

SHADI LAL, J.

*Buta Singh*—Plaintiff—Appellant.

v.

*Lalla*—Defendant—Respondent.

Second Appeal No. 1002 of 1918, Decided on 13th November 1918, from decree of District Judge, Ferozapore, D/- 11th December 1917.

(a) **Easements Act (5 of 1882), S. 13—Joint property—Partition—Easements enjoyed before partition pass to co-parceners to whom such shares are respectively allotted.**

On a severance of tenements by a partition of joint property and in the absence of a contrary intention, expressed or necessarily implied, all such easements as are apparent and continuous and necessary for enjoying any of the undivided shares when the partition is effected, pass to the co-parceners to whom such shares are respectively allotted in severalty. [P 235 C 1]

(b) **Easements Act (5 of 1882), S. 13—Easement of necessity—Existence of some other tenement does not take away right—Extinguishment must be proved by agreement or law.**

An easement of necessity does not lose its character as such by the mere fact that some other tenement exists over which the right might be enjoyed. A person who alleges the extinguishment of a right of easement must prove such extinguishment by some agreement or rule of law. [P 235 C 1]

*Bihari Lal*—for Appellant.*Ganpat Rai*—for Respondent.

**Judgment.**—The learned District Judge finds, and there is ample evidence in support of that finding, that the plaintiff originally had the right to pass his water through the drainage which existed in the common courtyard; and the only question is whether the partition of the courtyard had the effect of destroying his right of easement. I am unable to agree with the learned Judge that it was the plaintiff's duty to establish an express or implied agreement that the previous

(3) [1917] 37 I. C. 872.

(4) [1916] 35 I. C. 230.



drainage system was to continue after the partition. I consider that the onus lay upon the defendant to shew that the right, which the plaintiff possessed prior to the partition, has been extinguished by some agreement or rule of law. The principle of law, which finds expression in S. 13, Easements Act, is that on a severance of tenements by a partition of joint property, and in the absence of a contrary intention expressed or necessarily implied, all such easements, as are apparent and continuous and necessary for enjoying any of the undivided shares when the partition was effected, pass to the co parceners to whom such shares are respectively allotted in severalty. Mr. Ganpat Rai for the respondent does not dispute the validity of this proposition of law; but he contends that the easement is not one of necessity, and that the plaintiff can discharge his water through the land purchased by him from one Tulsi Ram. Now, in the first place, I am not prepared to hold that the fact that the plaintiff has got another tenement through which he can pass his water deprives the easement in question of the character of an easement of necessity.

In determining the question whether the easement is an easement of necessity we cannot take into consideration some other tenement which has nothing to do with the tenement in question. In the second place, it is clear from the judgment of the learned District Judge that the level of the land purchased from Tulsi Ram is higher than that of the courtyard and that it would be necessary to pass a pipe underneath it in order to find an outlet for the water. I do not think that the plaintiff is under any obligation to resort to this method of discharging his water, and that he is precluded by any law from availing himself of the right which undoubtedly he had at the time of the partition and which has been interfered with by the defendant only recently. Holding as I do that it is the defendant's duty to prove that the plaintiff's right of easement has been in any way extinguished and that he has failed to discharge the onus, I accept the appeal, and setting aside the decree of the lower appellate Court restore that of the Court of first instance with costs throughout.

R.M./R.K.

*Appeal accepted.***A. I. R. 1919 Lahore 235**

WILBERFORCE, J.

*Mt. Uttam Devi*—Defendant—Appellant.

v.

*Dina Nath*—Plaintiff—Respondent.

Misc. First Appeal No. 3273 of 1916, Decided on 13th July 1918, from order of Dist. Judge, Gurdaspur, D/- 24th August 1916.

Probate and Administration Act (5 of 1881), S. 64—Deceased, member of joint family—Another member cannot apply for letters as on death property passes by survivorship.

A member of a joint Hindu family with a deceased person is not competent to apply for Letters of Administration to that person's estate. In such a case the estate passes by survivorship and there is nothing left to administer.

[P 236 C 1]

*Beni Pershad and Balwant Rai*—for Appellant.*Sheo Narain and Tek Chand*—for Respondent.

**Judgment.**—The appellant is the widow of one Sham Lal, a retired tahsildar. Letters of Administration of his estate have been granted to his nephew, Dina Nath, who also alleges himself to be a member of the joint Hindu family with the deceased and his adopted son. There were many disputed questions in the case and a large amount of time was wasted in taking evidence which in the end has not been utilized for the basis of any decision. The decision of the case, so far as is necessary to describe it for the purposes of this appeal, was that Letters of Administration should be granted to the applicant as he was the most suitable person to administer the estate. Whether he was also a member of a joint Hindu family with the deceased, or an adopted son or not, the lower Court gave no finding on these disputed points. The further question arising was whether Letters of Administration should be granted in respect of a sum of Rs. 10,000 deposited in the Alliance Bank of Simla in the names jointly and severally of Sham Lal and his wife or survivor. The lower Court granted Letters of Administration in respect of the sum but left open the question whether the widow was rightly entitled thereto or not.

On appeal the first point argued is that the applicant having claimed that he and Sham Lal were members of a joint Hindu family, no application under Act 5 of 1881 was competent, there being no estate



in respect of which such an application could be made. It is manifest that if Sham Lal and applicant were members of a joint Hindu family, there was no estate of Sham Lal to be administered, the estate having vested by survivorship in the applicant. The appellant relies on the above arguments and on *Mathura Prasad v. Durgawati* (1). This authority deals with a case under the Succession Certificate Act but the law and principles of law concerned are exactly similar. Counsel for the respondent argues that this objection cannot be taken by the appellant on the ground that the appellant refuses to admit Dina Nath and Sham Lal to have formed a joint Hindu family. As however the applicant himself stated in his application that he and Sham Lal formed a joint Hindu family, he cannot be allowed to resile from this position, nor even before me has any suggestion been made that the facts stated in the application were in any way incorrect. The lower Court was in error in granting Letters of Administration merely on the ground that the applicant was the nephew of Sham Lal, for a surviving member of a joint Hindu family is necessarily also a relation of a deceased member. Counsel for the respondent also argues that there is no legal bar to the granting of Letters of Administration to the surviving member of a joint Hindu family if he is willing to pay the court-fees required. He relies especially on *In re Dasu Manavala Chetty* (2). This authority however deals only with the question of court-fees payable and any remarks favourable to respondent are obiter.

I hold that applicant, being a member of a joint Hindu family with deceased according to his own statement, was not competent to apply for Letters of Administration, I accept the appeal and grant costs in both Courts to appellant (Rs. 80 pleader's fee in each Court). The order regarding payment of costs for adjournment by appellant will stand, no reason being advanced against this order.

R.M./R.K.

*Appeal accepted.*

(1) A. I. R. 1914 All. 68=36 All. 330=24 I. C. 182.

(2) [1910] 33 Mad. 93=4 I. C. 1064.

## A. I. R. 1919 Lahore 236

MARTINEAU, J.

*Krishen Deo Singh*—Petitioner.

v.

*Hari Singh*—Opposite Party.

Criminal Revn. No. 707 of 1918, Decided on 14th December 1918, from order of Dist. Magistrate, Lyallpur, D/- 20th May 1918.

Criminal P. C. (1898), Ss. 145 and 435—Order under S. 145—Application under S. 435 for revision abates on death of applicant.

An application under S. 435 for the revision of an order passed under S. 145 of the Code abates upon the death of the applicant, the right to carry on the proceedings conferred by sub-S. (7), S. 145, being confined to proceedings before a Magistrate. [P 236 C 2]

*Beechey and Obedulla*—for Petitioner.  
*C. Bevan Petman, Sewa Ram Singh and Govind Das*—for Opposite Party.

**Judgment.**—In this case Sardar Krishen Deo Singh applied for revision of an order of the District Magistrate of Lyallpur, which was apparently intended to be an order under S. 145, Criminal P. C. While the application was pending the applicant died. His mother wishes to prosecute the case as his representative, and counsel have appeared on her behalf. Counsel for the respondent contends that the application for revision abates, and I think the contention is correct. The provision in S. 145 (7), Criminal P. C., that proceedings under that section shall not abate by reason only of the death of any of the parties thereto relates only to proceedings before the Magistrate. In *Khazana v. Queen Empress* (1), where a person whose appeal from an order convicting him of an offence had been dismissed died while his application for revision was pending, it was held that by analogy to S. 431 of the Code the application must abate. Following that authority I hold that the application in the present case abates. I also see no sufficient reason for this Court to interfere on its own motion with the District Magistrate's order.

R.M./R.K.

*Petition rejected.*

(1) [1883] 6 P. R. 1883 Cr.



**A. I. R. 1919 Lahore 237 (1)**

SHADI LAL AND WILBERFORCE, JJ.

*Girdhari Ram* — Plaintiff — Appellant.

v.

*Mt. Sitan Bai* and others—Defendants—Respondents.

Second Appeal No. 2016 of 1917, Decided on 15th May 1918, from decree of Dist. Judge, Dera Ghazi Khan, D/- 10th May 1917.

**Restitution of conjugal rights—Minority of wife can be ground for refusing relief.**

Where in a suit for restitution of conjugal rights it appears that one or both of the spouses is or are, on account of minority or other reason, incapable of discharging the conjugal duties, the Court may refuse to grant a decree. But the mere refusal of a minor wife to live with her husband is not a sufficient ground for dismissing the husband's suit. [P 237 C 1,2]

*Gokal Chand Narang*—for Appellant.*Ram Chand Manchanda*—for Respondents.

**Judgment.**—This appeal arises out of an action brought by the appellant *Girdhari Ram* for restitution of conjugal rights against his wife *Mt. Sitan Bai*, and for the usual injunction against her maternal grandmother and father. The learned District Judge finds in favour of the plaintiff both on the factum and the validity of the marriage. He has however dismissed the suit on the sole ground that *Mt. Sitan Bai*, who was a minor at the time of the marriage, has now

"reached or is reaching maturity and opposes the idea of being made to live with her husband,"

and that the Courts should not issue a decree "disregarding her wishes." Now, we are clearly of opinion that this is an erroneous view of the law, and that the judgment of the learned District Judge must be set aside. We fully recognize the principle of law that if one or both of the spouses is or are on account of minority or other reason, incapable of discharging the conjugal duties, the Court may refuse to grant the decree for restitution of conjugal rights. To this category belong the cases reported as *Kalu v. Mt. Aisha* (1) and *Dinu v. Abdulla* (2) relied upon by Mr. Ram Chand Manchanda for the respondents. The learned pleader however places his special reliance upon an unreported Single Bench judgment in Civil Appeal No. 1254

(1) [1892] 123 P. R. 1892.

(2) [1894] 85 P. R. 1894.

of 1911 [*Mt. Kalawati v. Bukhan* (3)] which certainly contains certain observations favourable to his contention, but a perusal of the entire judgment shows that the learned Judge was of opinion that in the peculiar circumstances of the case the plaintiff "was not entitled to a decree at all." If the judgment intended to lay down a broad proposition that the mere refusal of a minor wife affords a sufficient ground for the dismissal of the husband's suit for restitution of conjugal rights, we must say that with all possible respect we are unable to accept that view. Indeed any such rule would lead to the dismissal of practically every suit in which the wife happens to be a minor, and that would result in very serious consequences. It must be remembered that *Mt. Sitan Bai*, though technically a minor, has attained puberty, and it cannot be contended that she is an immature aged.

For the aforesaid reasons we accept the appeal and decree the plaintiff's suit for restitution of conjugal rights against *Mt. Sitan Bai*, and for injunction against the remaining two defendants. We direct *Mt. Asi Bai*, who contested the suit, to pay the costs incurred by the plaintiff in all the Courts.

R.M /R.K.

Appeal accepted.

(3) [1912] 215 P. L. R. 1912=17 I. C. 254.

**A. I. R. 1919 Lahore 237 (2)**

SCOTT-SMITH, J.

*Ganesha Mal*—Plaintiff—Appellant.

v.

*Ibrahim* and others—Defendants—Respondents.

Second Appeal No. 1474 of 1918. Decided on 7th January 1919, from decree of Dist. Judge, Ludhiana, D/- 31st January 1918.

(a) Tort—Trespass—Peaceful possession—Infringement of—Cause of action accrues—Suit under S. 9 is not compulsory—Specific Relief Act (1 of 1877), S. 9.

The peaceful possession of a person is a substantial right the infringement of which gives rise to a cause of action, and although if he is dispossessed, he has the right to sue under S. 9, Specific Relief Act, he is not bound to do so.

[P 238 C 1]

(b) Cosharer—Joint khata—Possession of one cosharer cannot be disturbed by another—Dispossessed cosharer can sue for possession.

In the case of a joint khata of agricultural land one cosharer ordinarily cultivates one field and other cosharers cultivate other fields, but one cosharer cannot dispossess the other against his will from the field of which he has possession.



Where such dispossession takes place the dispossessed cosharer can sue to recover possession of the plot of which he has been deprived.

[P 233 C 1, 2]

*Rup Ram*—for Appellant.

*Ghulam Rasul*—for Respondents.

**Judgment.**—This is a suit for recovery of possession of 4 biswas and 14 biswansis of land out of a joint holding from which it is alleged the plaintiff-appellant was dispossessed against his will by defendant Ibrahim. The parties are joint owners in the holding. It is admitted that the plaintiff has for the last 14 or 15 years cultivated 2 bighas 10 biswas and 14 biswansis through Nanda as tenant. In January 1917 the defendant is said to have taken illegal possession of the land in suit. The first Court gave a decree for possession of the land but the lower appellate Court dismissed the suit. It held that the suit would have been maintainable under S. 9, Specific Relief Act, if brought within six months of the date of dispossession. As it was brought seven months after that date, the plaintiff has no remedy but to apply for partition.

Mr. Rup Ram on behalf of the plaintiff-appellant cites *Wazir Singh v. Mehtab Singh* (1) and *Jhangi v. Ramzan* (2) as authorities for the proposition that one cosharer may under certain circumstances take and keep exclusive possession of a portion of shamilat land for his own use until partition, and that another joint owner is not by reason of the land being shamilat necessarily entitled to disturb his possession. For the respondents it is contended that these rulings are not applicable as the land in suit is not shamilat deh. In my opinion the principle of those rulings is applicable. In the case of a joint khata of agricultural land one cosharer ordinarily cultivates one field and other cosharers cultivate other fields, and it is certainly not the law that one sharer can dispossess the other against his will from the field of which he has possession. In *Jhangi v. Ramzan* (2) it was stated that in accordance with well-known law and custom as to possession of plots of shamilat by individual cosharers the defendants in forcibly dispossessing were *qua* plaintiff mere trespassers. In accordance with this principle I hold that plaintiff-appellant's peaceful possession was a substantive right,

the infringement of which gave rise to a cause of action. As pointed out, in that case also the plaintiff might have sued under S. 9, Specific Relief Act, but he was not bound to do so. Plaintiff cultivated cheri in the land in kharif 1916 and it may very possibly have been lying vacant in the succeeding rabi. That fact alone would not however entitle defendant to take possession without the plaintiff's consent. I hold that plaintiff is entitled to recovery of possession. As to the claim for Rs. 7-8-0 on account of damages, I do not think that plaintiff can recover that amount in the civil Court. It is a sum which would apparently be recoverable under S. 14, Punjab Tenancy Act. I accept the appeal so far as to give plaintiff a decree for possession of the land claimed. As plaintiff has only partially succeeded, I order that the parties should bear their own costs throughout.

R.M./R.K.

*Appeal accepted.*

### A. I. R. 1919 Lahore 238

WILBERFORCE AND MARTINEAU, JJ.

*Sher Dil*—Convict—Appellant.

v.

*Emperor*—Opposite Party.

Criminal Appeal No. 598 of 1918, Decided on 22nd November 1918, from order of Addl. Sess. Judge, Shahpur, D/- 21st August 1918.

**Criminal P. C. (1898), S. 288—Evidence given at preliminary inquiry retracted at trial—Conviction cannot be based on such evidence.**

A conviction based solely on evidence given by the witnesses before the committing Magistrate and retracted by them at the trial is unsustainable: 51 T. R. 1887 Cr.; 21 All. 111 and 28 All. 683, Foll. [P 240 C 1, 2]

*Lala Mul Chand*—for the Crown.

**Judgment.**—The appellant, *Sher Dil*, a Pathan of Mauza Chapri in the Mainwali District, has been convicted of the murder of Samundar Khan, who originally came from the same village, and sentenced to death. The facts alleged by the prosecution are as follows: Samundar Khan went with his daughters, Ghanammi and Gulai, about 12 and 8 years old respectively, to look for work in the Canal Colony. He met *Sher Dil* who was accompanied by his mother, sister and two brothers, and they advised him not to go in the direction he intended as plague was prevailing. He turned back and the two parties travelled together. One morning they stopped to rest at a

(1) [1889] 108 P. R. 1889.

(2) [1910] 13 P. R. 1910=5 I. C. 808.



place about two kos from Rangpur and while they were there, Sher Dil suddenly attacked Samundar Khan giving him several blows with the back of a hatchet and killing him. He then dug a pit close by and buried Samundar Khan's body in it. The party proceeded on till they reached Pilo Wains where Sher Dil sold the two girls, whom he represented to be his sisters. Mt. Ghanammi was sold to Mehr Khan for Rs. 300 and Mt. Gulai to Shera for Rs. 88 and the marriages were performed. Sher Dil and his relations then departed. In the morning Mt. Ghanammi began crying and told Shera's mother, Mt. Fatima, P. W. 15, that Sher Dil was not her brother and that he had killed her father. Mehr Khan and another man went after Sher Dil's party and told them that Mt. Ghanammi was crying and did not want to stay. Sher Dil returned with his relations, paid back the money he had received, and took the two girls away with him. They went to Khaglanwala, where Sher Dil's mother, sister and brothers left him. In the morning the sentry on the roof of the Khaglanwala police post saw Mt. Ghanammi and her sister running and crying, followed by Sher Dil who was threatening them. He asked the girls what was the matter and Mt. Ghanammi said that the man had murdered their father and she was afraid he might sell them again. Mt. Ghanammi's statement was recorded by the Sub-Inspector and Sher Dil was arrested. Mt. Ghanammi afterwards pointed out the place where she said her father had been killed and the where he had been buried. The ground at the latter place had been dug up by animals. All that was found was a man's bones. The Assistant Surgeon to whom they were sent for examination says that there were no cuts on the bones, and he is unable to state the cause of death.

Before the committing Magistrate the deceased's daughters, Mt. Ghanammi and Mt. Gulai, and the appellant's mother, Mt. Mull Masti, his sister, Mt. Shah Masti, and his brothers, Mir Badshah and Lal Badshah, all deposed to having seen Sher Dil kill Samundar Khan with a hatchet. Of these witnesses Mir Badshah was not examined in the Sessions Court as he had enlisted in a regiment at Quetta. The others all retracted in that Court the statements made before the Magistrate and deposed to the effect

that Samundar Khan was not struck with the hatchet, but that he had fever and a boil on the groin and that as he was sitting down he fell back and died.

The case against the appellant rests on the depositions of these witnesses given before the committing Magistrate and transferred to the record of the Sessions Court, Mir Badshah's under S. 33, Evidence Act, and the others' under S. 288, Criminal P. C. The learned Sessions Judge has given certain reasons for believing those statements in preference to the statements made at the trial. First he says that if Samundar Khan had a plague bubo, he would hardly have been in a condition to travel on foot. But even if the statements of the witnesses be exaggerated in this respect, it is still quite possible that Samundar Khan may have died suddenly from heart failure. Next it is urged that if Samundar Khan had not been murdered, his companions would have carried him to the cemetery and buried him there. This argument has little force, seeing that the party was some miles away from the nearest village or habitation. Then it is said that Mt. Ghanammi had no good reason for falsely accusing Sher Dil of murdering her father. But it appears to us quite possible that she invented the story of the murder when she was at Pilo Wains because she did not wish to remain with Mehr Khan, and that she repeated the accusation at the Khaglanwala in order to get free from Sher Dil, who she was afraid would sell her to some one else. It is also possible that she and her sister may not have been present when their father died and that from his dying suddenly and being buried by Sher Dil they may have really thought that Sher Dil had murdered him.

As regards the fact of Sher Dil's mother, sister and brothers having given evidence against him in the committing Magistrate's Court, this may be accounted for by their being afraid that they would themselves be charged with abetting the murder if they did not give evidence in support of Mt. Ghanammi, for it is admitted by the Sub-Inspector Aziz Beg that they were at the beginning suspected by the Mianwali police of complicity in the murder and were under supervision. There are, on the other hand, several points in favour of the appellant. To begin with, the story of the murder having been committed openly, not only



in the presence of Sher Dil's relations but also in the presence of Samundar Khan's daughters, does not appear to be a probable one. Secondly, it is, as noticed by the learned Sessions Judge, a point in the appellant's favour that no blood was found on the coat which Samundar Khan was wearing at the time of his death and which appears to have been recovered from a camel man to whom it had been given, notwithstanding that in the first information report Mt. Ghanammi said that blood had flowed from her father's mouth and nose.

Thirdly, there is the fact that after Samundar Khan's death Sher Dil took the children first to a chhabil near Billu where he bought food from Arjan Singh (P. W. 17) and then to two other villages before reaching Pilo Wains, where they arrived on the third day, and that the girls made no complaint at any of those places. The learned Sessions Judge thinks they might have been intimidated by Sher Dil, but would Sher Dil, if he had been the murderer of their father, have taken such a great risk, knowing that they might at any time have accused him to the people they met? Then it is surely strange that the girls should have allowed themselves to be sold and given in marriage by their father's murderer without saying a word about the murder. It was not till the next morning that Mt. Ghanammi told Mt. Fatima that Sher Dil had murdered her father. What is still more remarkable is that, as is stated by Mt. Fatima and Mehr Khan, Mt. Ghanammi and her sister went to the length of embracing Sher Dil when he came back to Pilo Wains to take them away and return the money. This was most unnatural conduct if the prosecution theory as to Samundar Khan having been murdered is true. Mt. Fatima says that when Sher Dil returned Mt. Ghanammi admitted that the story she had told was a pretence which she had made in order that she might be able to rejoin her party. If that is true, it is impossible to rely on the evidence which Mt. Ghanammi gave before the Magistrate.

In *Umar v. Empress* (1) Plowden, J., expressed the opinion that a conviction based solely on evidence given by the witnesses before the committing Magistrate and retracted by them at the trial

(1) [1887] 51 P. R. 1887 Cr.

is unsustainable, and a similar view was taken by Banerji, J., in *Queen-Empress v. Jeochi* (2) and *Emperor v. Dwarka Kurmi* (3). We think in the present case not only that it would be unsafe to convict solely on the statements made by the alleged five witnesses of the murder before the committing Magistrate but that there are strong grounds, apart from the fact of the statements having been retracted for doubting their truth. We therefore accept the appeal set aside the conviction and sentence, and acquit Sher Dil and direct that he be set at liberty.

R.M./R.K.

*Appeal accepted.*

(2) [1898] 21 All. 111.

(3) [1906] 28 All. 683=4 Cr. L. J. 461.

### \* A. I. R. 1919 Lahore 240

CHEVIS, J.

*Abdul Hakim*—Plaintiff—Appellant.

v.

*Shugan Chand and others*—Defendants—Respondents.

Second Appeal No. 733 of 1917, Decided on 16th February 1919, from decree of Dist. Judge., Karnal, D/- 31st October 1916.

\* Decree—Setting aside—Fraud—Effect—Decree set aside—Former suit is not revived.

The setting aside of a decree found to have been obtained by fraud does not mean the revival of the former suit; 10 I. C. 355; 5 I. C. 226 and 36 I. C. 366, Dist. [P 241 C 2]

Where in a suit against a minor, who is not represented, the plaintiff obtains a decree by suppressing certain evidence and not giving credit to the minor for payments made on his behalf, the decree is liable to be set aside on the ground of fraud and the decree holder is not entitled to re-open the former suit; 10 Bom. 338, Foll. [P 241 C 1]

*Niaz Ali*—for Appellant.

*Moti Sagar*—for Respondents.

**Facts**—In 1889 one A. H., the father of the present plaintiff, mortgaged a house to S., the defendant, for a sum of Rs. 500. Of this sum all but Rs. 40 had been paid, when in 1892 A. H. executed a further mortgage in favour of S. for a sum of Rs. 260 including the former balance of Rs. 40, and got back the deed of 1889. In 1897 one B. obtained a decree against A. H. in execution of which one third of the house was sold by auction for Rs. 90 to one A. S. The objections of S. having been dismissed, he filed a regular suit for the realisation of the amount of his second mortgage impleading as defendants the present plaintiff, his mother B, and A. S., and



obtained a decree for the sale of the whole house. In execution only two-thirds of it were sold, he himself being the purchaser. The plaintiff on attaining majority brought the present suit for a declaration that the decree obtained by S. in 1898 was obtained by fraud and was not binding on him and that he was the owner of the two-thirds portion of the house sold in execution of the said decree. The Munsif held that the plaintiff had not been properly represented in that suit and that the decree was obtained by fraud. It appeared that the proceedings in that suit were ex parte against all defendants except A. S. But the Munsif dismissed the suit on the ground that as the plaintiff was not in possession, a suit for declaration did not lie.

On appeal the District Judge held that the plaintiff was in possession and was therefore entitled to ask for a declaratory decree. But he dismissed the suit, holding that the plaintiff was properly represented in the suit of 1898 and had failed to show that S. obtained the decree by fraud. The plaintiff preferred a second appeal to the Chief Court and it was conceded by counsel for S. that the District Judge's finding on the question of representation was incorrect. The Court held that the result of the suit depended upon whether or not the mortgage of 1892 had been satisfied before the suit of 1898 was instituted and remanded the case under O. 41, R. 25, Civil P. C., to the District Judge for a finding on the evidence on the record and report upon this point. On remand the District Judge found that the mortgage-debt of 1892 had not been discharged when S. filed the suit against the plaintiff in 1898.

**Judgment.**—The facts of this case are given in the previous order of this Court dated 11th January 1918, remanding the case to the District Judge for a finding whether the mortgage of 1892 had been satisfied before the suit of 1898 was instituted. The learned District Judge has examined Shugan Chand, and come to a finding that the items of Rs. 44, Rs. 55 and Rs. 79 were not paid towards this mortgage and that the mortgage was not satisfied. I can only say that the District Judge seems to have been ready to accept any and every explanation put forward by Shugan Chand. Shugan

Chand explains, for instance, that the item of Rs. 55 paid on 23th July 1893 was taken in settlement of four items of Rs. 15, Rs. 10, Rs. 5 and Rs. 20, total Rs. 50, together with Rs. 5 interest. These four items appear in Shugan Chand's account books. But unfortunately for Shugan Chand his own books show that these four items were advanced by him after the item of Rs. 55 was paid to him, so this sum of Rs. 55 cannot possibly have been paid in settlement of these four items. Shugan Chand may be, as the Munsif says, one of the cleverest baniahs in Panipat, but his explanation with regard to the Rs. 55 item is anything but clever, in fact it is palpably false, and I have no hesitation in agreeing with the first Court that this sum of Rs. 55 was paid towards the mortgage of Rs. 260; the words in the receipt "rupai 260 men" also clearly refer to the mortgage. Seeing how Shugan Chand has lied with respect to the above item, I am not prepared to accept his explanation on other points. But I consider it unnecessary to go into the other items. It is clear to me that when Shugan Chand brought his suit he falsely and fraudulently concealed a certain payment of Rs. 55 and made out his mortgage debt to be greater than it really was. He took advantage of the minor not being represented and his decree was fraudulent. This is I consider a sufficient reason for setting the decree aside.

Lala Moti Sagar urges that I should go into the whole case, and come to an exact finding as to what sum (if any) was really due on the mortgage when Shugan Chand brought his suit, and that the decree should not be entirely set aside unless it is found that the mortgage debt was wholly discharged. He argues that the decree should merely be reduced to that amount which was actually due on the mortgage when Shugan Chand obtained his decree. He quotes *Raj Kumar Roy v. Hara Krishna Chakravarty* (1), *Sarbesb Chandra Basu v. Hari Dayal Singh Rai* (2) and *Bhagwan Dayal v. Param Sukh Dass* (3) and urges that setting aside the decree means the revival of the former suit. No doubt this may be right in some cases, but is it so when the former decree is found to have been ob-

(1) [1911] 10 I. C. 355.

(2) [1910] 5 I. O. 236.

(3) [1917] 39 All. 8=36 I. O. 336.



tained by fraud? Not one of the above cases appears to be a case in which the decree was obtained by fraud. Lala Moti Sagar then argues that mere suppression of evidence and not giving credit for repayments is not fraud, and here he quotes *Chinnayya v. Ramanna* (4). But Shugan Chand is a clever baniah, and I presume he knew well that the Rs. 55 had been paid in satisfaction of the mortgage; to suppress this fact in a suit against a minor who was not represented and thus to take an unfair advantage of the minor was, to my thinking, fraud and nothing but fraud. In *Bhimaji Gobind Kulkarni v. Rakmabai* (5), where a decree obtained by fraud had been set aside, the decree-holder was not allowed to re-open the former suit. And in my opinion this is the correct view. The fraudulent conduct of Shugan Chand, in my opinion, entails forfeiture of the decree, and he has no right to re-open the former case. I decline therefore to discuss the remaining items in dispute. I accept this appeal and setting aside the orders of the lower Courts I grant plaintiff a decree as claimed in the plaint. Shugan Chand will pay plaintiff's costs in all Courts.

R.M./R.K.

*Appeal accepted.*

(4) [1915] 38 Mad 203=19 I. C. 579.

(5) [1886] 10 Bom. 338.

### A. I. R. 1919 Lahore 242

SHADI LAL AND MARTINEAU, JJ.  
*Official Liquidator, Industrial Bank of India Ltd.*—Plaintiff—Appellant.

v.

*Kesho Das and another*—Defendants—Respondents.

Second Appeal No. 2532 of 1917, Decided on 30th May 1919, from decree of Dist. Judge, Lyallpur, D/- 23rd May 1917.

*Companies Act* (7 of 1913) Ss. 184 and 186—*Company in liquidation*—Suit by *Official Liquidator* to recover money due on *pro-notes*—Defendant is entitled to claim set-off sum due to him—Defendant not contributory of Bank—Liquidation Court has no jurisdiction to recover money by summary process—Order of liquidation Judge disallowing plea of set-off does not operate as *res judicata*—Civil P. C. (1908), S. 11 and O. 8, R. 6.

The *Official Liquidator* of a Bank in liquidation sued to recover a sum of money due on a promissory note executed by the defendants who claimed to set off against the plaintiff's demand the money received by the Bank by way of security for the due performance of his duties by K., one of the two defendants, on his appointment

as cashier of the Bank. It appeared that the defendants were members of a joint Hindu family and that the money deposited with the Bank belonged to the family. Moreover, the Bank in its dealings had treated the money as belonging to both the brothers:

*Held*: (1) that the defendants who were debtors on the promissory note were creditors in respect of the money deposited as security and were therefore entitled to raise the plea of set-off; (2) that as the defendants were not contributories of the Bank, the Court conducting the liquidation had no jurisdiction to recover by a summary process the money due from them on the promissory note; (3) that an opinion expressed by the liquidation Judge with regard to the plea of set-off did not operate as *res judicata*.

[P 243 C 1]

*Niranjan Parshad*—for Appellant.

*Bahadur Chand and Fakir Chand*—for Respondents.

**Judgment.**—This appeal and Cross-Appeal No. 2723 of 1917 arise out of an action brought by the *Official Liquidator* of the *Industrial Bank* for the recovery of a sum of money due on a promissory note executed by the defendants, Kesho Das and Wazir Chand, on 16th March 1912. The defendants, who are brothers, claimed to set off against the plaintiff's demand the money received by the Bank by way of security for the due performance of his duties by Kesho Das, who was appointed a cashier of the Bank. The Courts below have accepted this defence, and the main question for determination is whether the defendants are entitled to the set off claimed by them. It appears that Kesho Das was appointed a cashier in November 1910, and that on 30th November 1910 a sum of Rs. 2,500 was deposited as security. The District Judge, concurring with the Court of first instance, finds that the defendants are members of a joint Hindu family, and that the money deposited with the Bank belonged to the family. This finding, which proceeds upon the evidence adduced by the parties, is a finding of fact and cannot be assailed in second appeal. Indeed, all the circumstances go to shew that the deposit was treated by the Bank as made by both the brothers, and it is beyond dispute that, when Kesho Das retired from the office of cashier, he was succeeded by Wazir Chand on 1st February 1912 on the same security deposit. The Bank in its dealings regarded the money as belonging to both the brothers, and upon that finding it is clear that the defendants, who were debtors on the pro-



missory note, were creditors in respect of the money deposited as security. The lower Courts were therefore right in giving effect to the plea of set-off, vide *Mehr Chand v. Amritsar Bank* (1).

As to the contention that this plea could not be entertained, because the Limitation Judge has already disallowed it by his order of 9th October 1915, it is sufficient to say that, as the defendants were not contributories of the Bank, the Court conducting the liquidation had no jurisdiction to recover by a summary process the money due from them on the promissory note. Mr. Niranjan Parshad admits that the liability on the promissory note could be enforced only by a regular suit, and it is obvious that the question of set off could arise only with respect to the liquidator's claim for the recovery of that money. Any opinion expressed by the Liquidation Judge cannot therefore preclude the defendants from putting forward their claim by way of set-off in answer to the plaintiff's demand; and we accordingly endorse the conclusion of the lower Courts that the bar of *res judicata* has not been established.

It appears that Wazir Chand was removed from his office on 1st December 1913, and there is nothing to show that the money deposited by way of security could not be claimed by the defendants immediately after that date. The Courts below have held that on 3rd December 1913 the defendants gave notice to the Bank to set off the amount due to it on the promissory note against their security deposit, and to pay them the balance. In these circumstances we must hold that the Bank, whose claim was legally discharged is not entitled to recover any interest after 1st December 1913. For these reasons we dismiss the appeal preferred by the liquidator, but accepting that of the defendants and reversing the decree of the lower appellate Court restore that of the Court of first instance with costs throughout. This appeal is dismissed with costs.

R.M./R.K.

*Appeal dismissed.*

(1) [1915] 63 P. R. 1915=28 I. C. 975.

## A. I. R. 1919 Lahore 243

RATTIGAN, C. J. AND MARTINEAU, J.

*Bala Parshad and others—Appellants.*

v.

*Sujan Singh and others—Respondents.*

First Appeal No. 2941 of 1917, Decided on 31st January 1919, from decree of Dist. Judge, Delhi, D/- 7th October 1917.

Evidence Act (1872), S. 115 — Sale by liquidator of equity of redemption subject to mortgage—Deed stating that mortgagee had relinquished claim for interest for certain period—Suit by mortgagee—Mortgagee having consented to relinquish claim for interest operated as estoppel and purchasers who derived their title from liquidator were precluded from disputing consideration for mortgage and amount of mortgagee debt specified in sale deed.

Plaintiffs sued for recovery of Rs. 1,92,331-7-0 on the basis of a deed dated 15th May 1906, by which S and Co. mortgaged the immovable property of the Jamna Mills to one G L and his sons, plaintiffs 1 and 2. G L was the head of the plaintiffs' firm carrying on business under the name of B L-G L and at the time of the mortgage he was also the Managing Director of the mortgagor company. It appeared that the Jamna Mills went into liquidation in 1900 and that S and Co. bought the mills for Rs. 2,30,000 at a public auction on 26th January 1901. On 6th May 1906, the Directors of S and Co. resolved to borrow Rs. 2,00,000 from the firm of B L-G L on the security of the immovable property of the mills, and hence the deed in suit was executed in favour of G L, and his sons. Subsequently S and Co. went into voluntary liquidation on 21st September 1913 and the liquidator sold the equity of redemption of the Jamna Mills to defendant 1 on 23rd February 1915 stating in the deed that the vendee was liable for the payment of the plaintiffs' mortgage-money and that the mortgagees had relinquished their claim for interest from the date of the liquidation to the date of the sale. On 23rd July 1915 defendant 1 executed a deed by which he conveyed the property to defendants 2, 5, 6 and 7 subject to plaintiffs' mortgage, the vendees being made liable to pay the amount due thereon;

*Held:* (1) that the mere admissions of the mortgage and the amount of the mortgage debt contained in the sale-deeds did not debar the defendants from pleading that there was no consideration for the mortgage of S and Co.

(2) that the fact of the mortgagees having consented to relinquish their claim for interest from the date of the liquidation to the date of the sale did operate as an estoppel and the defendants, who derived their title from the liquidator were precluded from disputing the consideration for the mortgage and the amount of the mortgage-debt specified in the sale-deed. [P 245 C 2]

(3) that the plaintiffs were consequently entitled to a decree for the amount claimed. 55 P. W. R. 1907, Dist. [P 246 C 1]

Muhammad Shafi, Moti Sagar and A. C. Bose—for Appellants.

Sheo Narain and Sewa Ram Singh—for Respondents.



**Judgment.**—The plaintiffs, of whom the 1st and 2nd are the sons, and the 3rd is a grandson, of Rai Sahib Girdhari Lal, have sued for the recovery of Rupees 1,92,331-7-0, including Rs. 1,87,198-8-6 principal and Rs. 5,132-14-6, interest on the basis of a deed, dated 15th May 1906 by which Saran and Co. mortgaged the immovable property and machinery of the Jamna Mills for Rs. 2,00,000 to Girdhari Lal and plaintiffs 1 and 2. The suit has been dismissed by the District Judge. The plaintiffs are the owners of a firm carrying on business under the name of Behari Lal-Girdhari Lal. At the time of the mortgage Girdhari Lal was the head of the firm. He was also the Managing Director of the Company which effected the mortgage and in consequence of this the genuineness of the mortgage and the passing of the consideration have been matters in dispute in the case.

The Jamna Mills Company went into liquidation in 1900. Saran and Co. purchased the mills at a public auction on 26th January 1901 for Rs. 2,30,000 of which Rs. 10,000 were paid at the time the payment of the remaining Rs. 2,20,000 being deferred on account of a dispute as to the rights of certain lien holders. The dispute was decided by this Court in March 1906, and at a meeting of the Directors of Saran and Co. held on 6th May it was resolved that out of the Rs. 2,20,000 which were to be paid to the Liquidator of the Jamna Mills Company, Rs. 20,000 should be paid from the current account and Rs. 2,00,000 be borrowed from the firm of Behari Lal-Girdhari Lal on the security of the immovable property and machinery of the mills. It was further resolved that from a cash credit account opened by Saran and Co. with the Allahabad Bank, the amount already due to Behari Lal-Girdhari Lal on the security of the moveable property in the mills should be paid off and a deed hypothecating that property to the Bank should be executed. Accordingly on 15th May 1906 the mortgage-deed in suit was executed by three of the Directors of Saran and Co. in favour of Girdhari Lal and his sons. On the same date Saran Co. drew a cheque for Rs. 2,11,000 on the Allahabad Bank in favour of Behari Lal-Girdhari Lal in payment of the debt due to them, and a separate cheque for Rs. 20,000 on the

same Bank in favour of Girdhari Lal. In lieu of these cheques Girdhari Lal obtained from the Allahabad Bank four cheques on the Bank of Bengal, namely, two for Rs. 1,00,000 each, one for Rs. 20,000 and one for Rs. 11,000, and on 19th May 1906 gave the first three cheques amounting to Rs. 2,20,000 to the official liquidator of the Jamna Mills Co.

On 21st September 1913 Saran and Co. went into voluntary liquidation. On 23rd February 1915 the liquidators of Saran and Co. sold the equity of redemption of the Jamna Mills to Lala Kidar Nath, defendant 1, retired District Judge for Rs. 54,000, stating in the deed that the vendee was liable for the payment of the plaintiffs' mortgage money, that Rs. 1,89,698-8-6 was the sum due on the mortgage up to the date of the liquidation, and that the mortgagees had relinquished their claim for interest from the date of the liquidation to the date of the sale. On the same day Lala Kidar Nath paid Rs. 2,500 to the plaintiffs in part-payment of the mortgage debt. On 23rd July 1915 he executed a deed by which he conveyed the property to defendants 2, 5, 6 and 7. In this deed also plaintiffs' mortgage was referred to and the property was sold subject to the mortgage, the vendees being made liable to pay the amount due thereon. The present suit was instituted on 7th August 1915 against Kidar Nath alone: but on his pleading that he had sold all his rights in the property, the vendees were made defendants. Two sons and two grandsons of defendant 2 were also added as defendants 3, 4, 8 and 9. On the pleadings eight issues were framed, but of these only the 1st and 8th have been the subjects of argument before us. Issue 1 is: "Did Saran and Co. mortgage their interest in the Jamna Mills and other property detailed in the plaint to the plaintiffs or their predecessors-in-interest on 15th May 1906 for Rupees 2,00,000?" And issue 8 is: "What amount is now due on the footing of the mortgage, and are defendants estopped from denying a liability on 23rd February 1915 amounting to Rs. 1,89,698-8-0?"

The learned District Judge holds that taking into consideration the fact that Girdhari Lal was not only the head of the firm Behari Lal-Girdhari Lal but also Managing Director of Saran and Co. and that he was intimately connected with



some of the Directors and officials of Saran and Co. the strictest proof is necessary to show that there was a genuine debt of Rs. 2,11,000 existing against the company on 15th May 1906, and he finds that the debt has not been established and that the execution of the mortgage-deed was simply a bogus transaction the object of which was to substitute a mortgage of the immovable property of the mills for a fictitious lien on the stock of the mills in favour of the plaintiffs' firm. He further holds that the mortgage was invalid because no proper disclosure was made to the company of the Managing Director's interest. Lastly he has held that the plaintiffs have not been induced to alter their position in any way on the faith of any instrument to which defendants 2—9 were parties, and that therefore those defendants are not estopped from denying liability. The plaintiffs have appealed, making only defendants 2—9 respondents, having given up their claim against defendant 1. It is contended by Mr. Shafi on behalf of the appellants: (1) that as the plea that the mortgage was a sham transaction, for which no consideration passed, was not taken till a late stage of the proceedings when the case was before the Commissioner appointed to go into the accounts, it should not have been entertained; and (2) that the defendants are estopped from raising such a plea. In the view that we take of the case we need only discuss the question of estoppel.

With regard to this question the contention is in the first place that the defendants are precluded by the admissions in regard to the mortgage contained in the two deeds of sale referred to above from disputing the consideration and denying their liability for the amounts stated in those deeds as due on the mortgage. Mr. Shafi draws a distinction between a purchase with mere notice of a mortgage and a purchase subject to a mortgage, and argues that whereas in the former case the purchaser can dispute the consideration for the mortgage, in the latter case he cannot do so. He has referred us to Ghose on *Mortgage*, Edn. 4, Vol. 1, p. 302; *Ram Kumar v. Dwarka Parshad* (1), *Ram Charan Misir v. Bhagwan Das* (2), *Shib Kunwar Singh*

*v. Sheo Prasad Singh* (3), *Subbarazu v. Venkataratnam* (4) and *Mirza Fateh Ali v. A. A. Gregory* (5), and the first three of these authorities support his argument. On the other side Mr. Sheo Narain contends that as the mortgagees were not parties to the deeds of sale, there is nothing in law to debar the purchasers from setting up as against the mortgagees the plea that the mortgage was without consideration. There appears to us to be much force in Mr. Sheo Narain's contention, and we do not find it stated in the authorities above cited, on which Mr. Shafi relies, on what principle of law the view expressed therein is based. Under the prov. 1, S. 92, Evidence Act, it would have been open to Saran and Co., had they been the defendants, to prove want of consideration for the mortgage even though the mortgage-deed had contained an admission that the consideration had been received, and it is difficult to see why the mere admissions to the mortgage and the amount of the mortgage-debt contained in the sale-deeds should debar the defendants from pleading that there was no consideration for the mortgage if Saran and Co. from whom the defendants derive their title would not have been so debarred.

But while we are not disposed to accede to the contention that the defendants are estopped merely by those admissions, there is one circumstance which we think does operate as an estoppel, and that is the fact of the mortgagees having as stated in the sale-deed of 23rd February 1915, consented to relinquish their claim for interest from the date of the liquidation to the date of the sale. After Saran and Co. had gone into liquidation the liquidators on 5th November 1913, wrote to the plaintiffs' firm asking them to send particulars of their claims against the company, and on 24th November the plaintiffs sent a statement of their account (p. 93 of the paper book) in which they showed Rs. 1,91,882.9.0 as the amount due on their mortgage including interest up to the end of that month. The liquidators replied on 25th May 1914, admitting Rs. 1,89,698.8.0 as due to the plaintiffs on the mortgage up to 20th September 1913, and saying that the claim for interest after that date would be

(1) [1912] 15 O. C. 211, = 15 I. C. 5.

(2) [1910] 5 I. C. 874.

(3) [1905] 28 All. 418.

(4) [1892] 15 Mad. 294.

(5) [1866] 6 W. R. (Mis.) 13.



settled later on (p. 95). Having regard to these facts and to the recitals in the sale-deed of 23rd February 1915, we think there can be no doubt that the plaintiffs consented at the instance of the liquidators of Saran and Co. to give up their claim for interest from the date of liquidation to the date of the sale. Mr. Sheo Narain contends that the interest relinquished could not have been legally claimed and he relies on *Ram Saran Das v. Bashesar Nath* (6) in support of this contention. But that was a case in which a company was being wound up by the Court and is therefore not in point as Saran and Co. were under voluntary liquidation.

The liquidators of Saran and Co., after having induced the plaintiffs to relinquish their claim for a large portion of the interest due on their mortgage would in our opinion have been estopped from disputing the consideration for the mortgage and the amount of the mortgage debt specified in the sale-deed, and the defendants who derive their title from the liquidators are equally estopped. Plaintiffs are consequently entitled to a decree for the amount claimed. It appears that a portion of the mortgaged property has been burnt, and we are informed by Mr. Shafi that the insurance money is in deposit in the Court. We accept the appeal and pass a decree for Rs. 1,92,331-7-0, with interest on Rs. 1,87,198 8-6 at 6 per cent. per annum from the date of the suit till realization, and costs in both Courts. The decretal amount will be a charge on the insurance money as well as on the mortgaged property. The insurance money will first be applied in payment of the decretal amount and the balance of that amount, if any will unless paid within six months from this date, be realized by the sale of the mortgaged property. Should the insurance money and the proceeds of the sale of the mortgaged property be insufficient to pay the amount due under the decree, the balance will be recoverable from the other property of the respondents.

R.M./R.K.

*Appeal accepted.*

(6) [1907] 55 P. W. R. 1907.

**A. I. R. 1919 Lahore 246**

BROADWAY, J.

*Prabhu Dial and another*—Plaintiffs—Appellants.

v.

*Shadi Ram and another*—Defendants—Respondents.

Second Appeal No. 2918 of 1918, Decided on 1st March 1919, from decree of Dist. Judge, Hissar, D/- 24-8-1918.

Custom (Punjab)—Pre-emption—Whether transaction is sale or exchange depends on circumstances attending deed—Transaction on whole was exchange and not sale—No right of pre-emption arises—It being question of fact no second appeal lies—Civil P.C. (1908), S. 100.

S and R entered into a transaction whereby S transferred a house belonging to him to R. Plaintiffs sued to obtain possession by pre-emption of the house transferred by S to R. It appeared that two deeds of sale were drawn up on the same day, that executed by S reciting the fact that he was selling his house to R for Rs. 500, of which Rs. 200 were paid in cash and Rs. 300 were to be given credit for on account of the sale by R to S of his house for that sum. It was contended that the transaction was an exchange and therefore not subject to pre-emption:

*Held:* (1) that it was for the Courts to decide, not only on the document itself, but on all the materials on the record, whether the transaction was a sale or an exchange; (2) that this was a question of fact and therefore a second appeal was not competent; (3) that the transaction, when looked at in its entirety, was in fact an exchange and not a sale and the plaintiff's suit could not therefore succeed. 97 P.R. 1900, *Foll.*; 30 Cal. 738 (P.C.) and 15 I. C. 343, *Dist.*

[P 247 C 2]

*Dalip Singh and N. C. Pandit*—for Appellants.*G. C. Narang*—for Respondents.

**Judgment.**—The facts of the case out of which this appeal has arisen are these: On 8th October 1915 Shadi Ram and Ram Chandra entered into a transaction whereby Sadhi Ram transferred a house belonging to him to Ram Chandra and Ram Chandra conveyed a house belonging to him to Shadi Ram. This suit is concerned with the transfer to Ram Chandra by Shadi Ram and the plaintiffs-appellants sought to obtain possession of the said house by pre-emption on payment of Rs. 200. Ram Chandra contested the claim on various grounds, the one now under consideration being that the transaction was an exchange and not a sale and therefore no suit for pre-emption was competent. The trial Court allowed this plea and dismissed the suit. The plaintiffs-appellants thereupon preferred an appeal to the District Judge who



however in an exceedingly short and incomplete judgment upheld the decision of the trial Court.

The plaintiffs-appellants have now preferred this second appeal and on their behalf I have heard Mr. Dalip Singh while Dr. Gokal Chand Narang has addressed me on behalf of Ram Chandra. Mr. Dalip Singh contended that inasmuch as the transfer was effected by means of a deed of sale, the transaction must be regarded as a sale, and therefore open to pre-emption. He urged that when a document, evidencing a transaction, was, on the face of it, a sale, the ven-lee could not set up a defence that the transaction was not a sale but an exchange. He cited *Ba'kishen Das v. Ram Narain Sahu* (1) as an authority for his contention. With that decision I am, needless to say, in complete accord, but I do not think it an authority for the proposition enunciated by the learned counsel. That was a case relating to a partition and the facts were entirely different from those in the case now under consideration.

What took place was this. Shadi Ram owned a house that Ram Chandra wanted and Ram Chandra had a house that Shadi Ram wished to obtain. Two deeds of sale were drawn up on the same day, that executed by Shadi Ram reciting the fact that he was selling his house to Ram Chandra for Rs 500 of which Rs. 200 were paid in cash and Rs. 300 were to be given credit for on account of the sale by him (Shadi Ram) to Ram Chandra of his house for that sum. Ram Chandra's deed of sale was not brought on to the record, but it was produced before me by Mr. Narang. In this the fact of sale is recited and it is specifically stated that the sum of Rs. 300 had been received by being credited in the other sale-deed. Mr. Dalip Singh contended that as a definite price had been fixed and mentioned in the sale-deed executed by Shadi Ram, the transaction must be regarded as a sale. He drew my attention to *Ariyaputhira Padayachi v. Muthukumarasami Padayachi* (2), wherein there is a discussion as to the meaning of the word price. Here again I have no quarrel with this authority, but I am unable to see that it assists in a decision of the point before me.

As held in *Gul Muhammad v. Tota Ram* (3), each case of this nature must be decided on the peculiar circumstances attending it, and it seems to me that it is for the Courts to decide, not only on the document itself, but on all the materials on the record whether a certain transaction was a sale or an exchange. *Nathu Mal v. Har Dial* (4) is a case practically on all fours with the present one. Two deeds of sale had been drawn up and it was held that in spite of this fact the transaction had been proved to have been an exchange and not a sale. Mr. Dalip Singh contended that this decision was bad law but I am unable to concur. Similarly I am unable to agree that it is really distinguishable.

In my opinion the transaction must be looked at in its entirety. When two persons desire to exchange two houses, which are of different values, it seems to me that the value of each house must necessarily be fixed so as to ascertain what amount of money must be paid in order to equalise matters, and that is what appears to have been done in the present instance. I agree with the Courts below in thinking that the present transaction was in fact an exchange and not a sale. I also think that the appeal must fail on another ground taken by Mr. Gokal Chand, viz., that the decision is one of fact and not open to examination in second appeal. It was contended by Mr. Dalip Singh that inasmuch as the construction of a document was involved the question was one of law. This however appears to me to be erroneous. So far as the document is concerned, there is no question of construction at all—it is clearly and admittedly only a sale deed. The nature of the transaction, however, has to be decided on a consideration not only of the document, but of the attendant circumstances and this decision is one of fact: vide *Ahmad Khan v. Alam Khan* (5). I accordingly dismiss this appeal with costs.

R.M./R.K.

*Appeal dismissed.*

(3) [1915] 82 P. R. 1915=31 I. O. 221.

(4) [1900] 97 P. R. 1900.

(5) [1916] 87 I. O. 297.

(1) [1908] 80 Cal. 738=80 I. A. 189 (P.O.).

(2) A. I. R. 1914 Mad. 489=37 Mad. 428=15 I. O. 848.



**A. I. R. 1919 Lahore 248 (1)**

SCOTT-SMITH, J.

*Hari Chand and another*—Convicts—Petitioners.

v.

*Emperor*—Opposite Party.

Criminal Revn. No. 915 of 1918, Decided on 15th November 1918, from order of Dist. Magistrate, Jhang, D/- 18th May 1918.

Criminal P. C. (1898), S. 522—For restoration under S. 522 dispossession by force as defined in S. 350, I. P. C. must have caused.

An order under S. 522, directing the restoration of immovable property can only be made where dispossession is effected by the use of criminal force as defined in S. 350 of the Penal Code [P 248 C 1]

*Nand Lal and Bahadur Chand*—for Petitioners.

**Judgment.**—This is an application for revision of an order of the District Magistrate of Jhang, dismissing an appeal of the petitioners who were convicted of an offence under S. 448, I. P. C. The Magistrate also passed an order against them under S. 522, Criminal P. C., to the effect that the complainant should be put into possession of the house in which the criminal trespass was committed. I saw no reason to interfere with the conviction under S. 448, but issued notice to the District Magistrate in regard to the order under S. 522, Criminal P. C., because there was no finding that criminal force as defined in S. 350, I. P. C., was used in the commission of the offence. S. 522, Criminal P. C. is to the effect that whenever a person is convicted of an offence attended by criminal force, and it appears to the Court that by such force any person has been dispossessed of any immovable property, the Court may, if it thinks fit, order such person to be restored to the possession of the same. In *Ishan Chandra Kalla v. Dina Nath Badhak* (1) it was held that in order to support an order under S. 522, Criminal P. C., there must be a finding that the dispossession was by the use of criminal force as defined in S. 350, I. P. C. Another authority to the same effect is that reported as *Bhatakala Pottivadu, In re* (2).

Now in the present case the allegation is that the trespass was committed in the absence of the complainant and

therefore it is clear that no criminal force was used to him, and there is no allegation that it was used to anybody who was in possession of the house on complainant's behalf. The order passed under S. 522, Criminal P. C., was therefore passed without jurisdiction and I accordingly set it aside, the revision being allowed to this extent.

R.M./R.K. *Application allowed.*

**A. I. R. 1919 Lahore 248 (2)**

SHADI LAL AND LEROSSIGNOL, JJ.

*Bhagwana and others*—Plaintiffs—Appellants.

v.

*Balik Ram and others*—Defendants—Respondents.

Second Appeal No. 1635 of 1914, Decided on 1st July 1918, from decree of Divl. Judge, Hoshiarpur, D/- 26th March 1914.

**Custom (Punjab) — Alienation — Creation of occupancy tenant is permanent alienation.**

The creation of an occupancy tenancy amounts to a permanent alienation of the land, inasmuch as the rights created derogate from the full title of the landlord. [P 249 C 1]

*Tek Chand*—for Appellants.

*Sundar Das*—for Respondents.

**Judgment.**—This was a suit by some of the heirs of one Lungal for possession of land which he had in one case mortgaged, and in two other cases encumbered with occupancy tenant rights. With regard to the area mortgaged, the learned Divisional Judge decreed possession to plaintiffs of their shares subject to payment of their proportionate share of Rs. 270, which sum representing an earlier encumbrance on the land had been paid off by the mortgagees-defendants. For the appellants-plaintiffs Mr. Tek Chand argued at length, with reference to O. 41 R. 27, and *Kessowji Issur v. G. I. P. Ry. Co.* (1) and *Marimuthu Pillai v. Velu Pillai* (2), that no evidence on this point was led by the respondents in the trial Court and therefore the Divisional Judge should not have admitted evidence in his Court. His argument however reposed on an imaginary foundation, for evidence that of Lal Chand, on the point was taken in the first Court and the Divisional Judge merely allowed that evidence to be supplemented and confirmed and gave appellants full opportunity of rebuttal. That payment by the respon-

(1) [1907] 31 Bom. 381 = 34 I. A. 115 (P. C.).

(2) [1916] 32 I. C. 908.

(1) [1900] 27 Cal. 174

(2) [1903] 26 Mad. 49.



dents placed them in the shoes of the prior mortgagees and prima facie the payment was for necessity. On this point the appeal fails. With regard to the creation of occupancy tenancies, the Courts below have contented themselves with a finding that the creation of occupancy tenancies is not a permanent alienation and have not considered whether their creation in the case was an act of good management. In our opinion the creation of an occupancy tenancy amounts to a permanent alienation, inasmuch as the created rights derogate from the full title of the landlord. And in the cases before us, the creator of the right appears to have been actuated not by a desire to improve his estate, but to secure cash with the slightest inconvenience to himself and the greatest loss to his successors. A mortgage of the land would have been his proper course. That the consideration for the creation of the tenancies was needed by Tungal, we see no reason to doubt; indeed after all these years necessity may be presumed. On this view we accept the appeal and decree to plaintiffs possession of their share (23/60) of the occupancy areas on their paying 23/60 of Rs. 240 to defendants 4 and 5 and 23/60 of Rs. 121 to defendants 6 to 10.

Regarding the shares of the plaintiffs' co-heirs, who have not sued, no argument has been addressed to us. Parties shall bear their own costs in this Court.

R.M./R.K. *Appeal accepted.*

### A. I. R. 1919 Lahore 249

BROADWAY, J.

*Nathu Mal-Saran Das*—Plaintiff—Petitioner.

v.

*Mehr Chand and another*—Defendants—Opposite Party.

Civil Revn. Petn. No. 494 of 1918, Decided on 9th January 1919, from order of Sub-Judge, Second Class, Amritsar, D/- 21st May 1918.

Civil P. C. (1908), S. 115—Interlocutory order should not be interfered with save in exceptional circumstances.

An interlocutory order should not be interfered with in revision save in exceptional circumstances. Plaintiff sued defendants on a bahi account. After the issues were framed the suit was referred to arbitration on the motion of the parties. On the award being given the defendants filed objections. The Court set aside the award and directed that the suit should proceed.

The plaintiff then applied to the Chief Court for revision of the order:

*Held:* that as no irreparable loss would be caused to the plaintiff by the order being allowed to stand and there were no exceptional circumstances to justify an interference in revision the Chief Court would not interfere: 26 Bom 551 and 30 Cal 397 *Foll.* [P 20 C 1]

*Tek Chand and Badr-ud-Din Qureshi*, for *Rambhaj Datta*—for Petitioner.

*Sheo Narain*—for Opposite Party.

**Judgment.**—The facts of this case are these:—The firm of Nathu Mal Saran Das instituted a suit against Mehr Chand and Puran Chand claiming Rs. 4,214-11-0 on a bahi account. After the issues had been framed the parties moved the Court to refer the case to the arbitration of one Lala Utam Chand, a pleader. The reference was accordingly made but before any award was filed, the defendants filed objections in Court accusing the arbitrator of partiality. This was on 15th January 1918 and the award was filed on 16th January 1918. To this award the defendants filed objections and on 21st May 1918 the learned Subordinate Judge set aside the award and directed that the suit should proceed in Court. The plaintiffs through Mr. Tek Chand then filed this petition, asking for a revision of the order setting aside the award. For the defendants Mr. Sheo Narain has raised certain preliminary objections. He contended (1) that the jurisdiction of this Court on the revision side is a discretionary one and that as the order complained of left the plaintiffs with another remedy it should not be interfered with at this stage; (2) that the order being an interlocutory one it should only be interfered with in exceptional circumstances which do not exist, and (3) that as no question of "jurisdiction" was involved no revision was competent.

In support of the third contention my attention was drawn to certain observations made by their Lordships of the Privy Council in *T. A. Balakrishna Udayar v. Vasudava Aiyar* (1). Mr. Tek Chand urged that these observations were really obiter dicta and were expressed in too wide terms, unless they were to be confined to the facts of the case that was before the Judicial Committee. I do not feel called upon to express any opinion on this point, however

(1) A. I. R. 1917 P. O. 71 = 40 Mad. 798 = 40 I. O. 650. (P. C.).



as it seems to me that there is force in Mr. Sheo Narain's second contention. The order that is sought to be revised is an interlocutory order and though I have power to interfere, it is only in exceptional cases that I should exercise that power. In this case the result of the order is that the case will now be tried by the Courts in the ordinary way and no irreparable loss can be caused to the plaintiffs. In my opinion *Damodar Trimbak Dharap v. Raghunath Hari* (2) and *Kali Charan Sirdar v. Sarat Chunder Chowdhry* (3) referred to by Mr. Sheo Narain are in point and that this Court should not interfere in orders of this nature. I accordingly dismiss this petition of revision with costs and direct that the case be proceeded with in due course.

R.M./R.K. *Petition dismissed.*

(2) [1902] 26 Bom. 551.

(3) [1903] 20 Cal. 397.

### A. I. R. 1919 Lahore 250 (1)

LEROSSIGNOL AND WILBERFORCE, JJ.

*Bahar Khan and others*—Plaintiffs—Appellants.

v.

*Kishen Chand and others*—Defendants—Respondents.

Second Appeal No. 715 of 1915, Decided on 9th December 1918, from decree of Dist. Judge, Hoshiarpur, D/- 8th December 1914.

**Custom (Punjab) — Alienation — Reversioners tenants of vendee during vendor's life time—Death of vendor — Reversioners are not estopped from contesting sale.**

The fact that the reversioners of a vendor cultivate a portion of the land sold, during his lifetime, as tenants of the vendee, does not operate to estop them, on the death of the vendor, from contesting the sale by suing for possession.

[P 250 C 2]

*Umar Bakhsh*—for Appellants.

*Tek Chand*—for Respondents.

**Judgment.**—This was a suit by reversioners for possession of land 59 kanals 18 marlas in area which was sold in 1878 by Sultani Khan and Bibi Sahibu, his sister-in-law, jointly. Bibi Sahibu died in December 1908 and Sultani Khan had predeceased her. The Courts below have dismissed the suit, holding, that as the plaintiffs during the lifetime of Bibi Sahibu cultivated a portion of the land sold to the vendees, as tenants of the vendees, that circumstance taken together with 35 years' silence estopped the plaintiffs from challenging the sale. The

plaintiffs come here in second appeal and though we cannot agree, inasmuch as during the lifetime of Bibi Sahibu the plaintiffs could not sue for possession, that cultivation by them as tenants of part of the land operates as an estoppel against them, still we hold that the appeal must fail, for from the evidence on the record it is quite clear to us that the sale was for consideration and necessity. The consideration for the sale consisted of an earlier mortgage, the interest on that mortgage and a bond, registered, of 1874 for Rs. 280. That bond itself arose out of an earlier bond of 1868 and that again was based upon an earlier bond, registered also, of 1865. Moreover we find that the mutation in 1883 was attested by Amir Khan, who was father of some of the plaintiffs and brother of others. For these reasons we dismiss the appeal with costs.

R.M./R.K.

*Appeal dismissed.*

### A. I. R. 1919 Lahore 250 (2)

RATTIGAN, C. J. AND SCOTT-SMITH, J.

*Har Kishen Singh and others*—Defendants—Appellants.

v.

*Lahore Bank Ltd.*—Plaintiff—Respondent.

First Appeal No. 500 of 1915, Decided on 8th November 1918, from decree of Sub-Judge, 1st Class, Amritsar, D/- 24th June 1914.

(a) **Limitation Act (1908), S. 5—Amendment of decree applied for within limitation for appeal—Time for appeal can be extended or delay can be condoned.**

A defendant is not bound to appeal from a decree at a time when the plaintiff has, within the period of ninety days allowed for an appeal, already applied for amendment of the decree. In any event, an extension of time for appealing should in such a case be granted under S. 5, Lim. Act. [P 251 C 2]

(b) **Civil P. C. (1908), O. 41, R. 25—Bad conduct of case—Important point left out—Remand in appeal is justified.**

Where a case is badly conducted in the lower Court and an important point has not been put in issue, the appellate Court would be justified in remanding the issue for trial. [P 252 C 1]

*Tek Chand*—for Appellants.

*Sunder Das*—for Respondent.

**Order.**—The plaintiff in this case is the Lahore Bank, Limited, of Amritsar, and it sues to recover a sum of Rs. 17,638 as principal and interest due on a promissory note executed on 3rd May 1911 by defendants 1 and 2, as "agents and managers" of a joint Hindu family which includes themselves and defendants 3, 4, 5,



and 6, the sons of defendant 1, who were, at the time of the institution of the suit, minors under the guardianship of their mother Mt Dhan Davi. The plaintiff Bank in its plaint further alleged that on the day when the promissory note was executed, defendants 1 and 2 mortgaged a three-storeyed house at Amritsar by way of an equitable mortgage to the Bank and handed over the title-deeds of the house. The relief claimed was a decree of Rs. 17,638 on account of principal and interest on the security of the mortgaged house referred to in the plaint together with costs against defendants and in the event of the house being insufficient in value to satisfy the claim, it was prayed that the decree might be realised from defendants' other property as well as against their persons. It was further prayed that interest from the institution of the suit to the satisfaction of the decree might be awarded at the agreed rate. Defendants 1 and 2 admitted the execution of the promissory note and the deposit of the title deeds by way of security, but pleaded that they had received no consideration in respect of the promissory note and that the deposit of title deeds did not create an equitable or legal mortgage of property in favour of the Bank. The minor defendants pleaded that the defendants were not members of a joint Hindu family, that defendants 1 and 2 had not executed the promissory note in the capacity of agents or managers of the family, that there was no necessity for the loan, and that the money was not borrowed or spent for the benefit of the family. The Subordinate Judge framed the following issues:

(1) Is the plaint signed and filed by a proper person on behalf of the plaintiff Bank? (2) Are defendants 1 and 2 and defendants 3 and 6 not members of a joint Hindu family? (3) Did defendants 1 and 2 execute the promissory note without receiving full consideration? (4) Is plaintiff entitled to recover the money due on the promissory note from the house, the title deeds as to which and its plan were deposited with the plaintiff? (5) Is plaintiff entitled to realize compound interest? As pointed out by the Subordinate Judge in his judgment, defendants were given numerous opportunities of producing evidence in support of their allegations, but these opportunities were not taken advantage of and in the result

three witnesses, two for the defendants and one for the plaintiff, were very briefly examined. Their evidence, such as it is, will be found at pp. 28 and 29 of the printed book. On 24th June 1914 the Subordinate Judge delivered judgment in favour of the plaintiff Bank whose claim was decreed in full with costs. The original decree did not however specify that the decretal amount could be recovered from the house which had been mortgaged to the plaintiff and consequently an application for amendment of decree was made on 30th July 1914. This application was granted and the decree duly amended on 19th November 1914. On 19th February 1915 Bawa Harkishen Singh, defendant 3, who had attained his majority after the decision of the case in the lower Court, filed an appeal to this Court and his memorandum included all the defendants as co-appellants, though it appears that he possessed no power-of-attorney from defendants 1 and 2 and does not appear to have been made a next friend of his minor brothers by any order of Court.

At the hearing before us Mr. Sunder Das on behalf of the respondent took a preliminary objection that the appeal was barred by limitation, inasmuch as it was not filed till February 1915, whereas the date of the original decree was 24th June 1914. The learned counsel conceded that the appeal would be in time so far as it purported to be merely an appeal from the amended decree of November 1914, but urged that (except as regards the amended portion of the decree) the original decree of June 1914 could not be attacked by an appeal filed more than 90 days after its date. We overruled this objection as it appeared to us untenable to contend that the defendants were bound to appeal from the decree of June 1914 at a time when the plaintiff had, within the period of 90 days allowed for an appeal already applied for amendment. In any event we were prepared to grant an extension of time under the provisions of S. 5, Lim. Act. On behalf of the appellant Harkishen Singh and the latter's minor brothers, Mr. Tek Chand informed us that the sole ground on which he proposed to attack the decree of the lower Court was that the burden of proof that the money borrowed by defendants 1 and 2 was taken for a necessary or family purpose lay upon the plaintiff Bank and that



this burden had not been discharged, the result being that no decree could be passed either against defendants 3 to 6 personally or against any part of the house in which they were cosharers. In support of the latter contention the learned pleader referred us to *Piare Lal v. Ram Chand* (1) and the recent ruling of their Lordships of the Privy Council reported as *Sahu Ram Chandra v. Bhup Singh* (2).

It appears that the plaintiff Bank in its plaint alleged that the money had been borrowed by defendants 1 and 2 "as agents or managers of a joint Hindu family," but it was not specifically stated or claimed that the money had been taken for such necessary or family purposes as would bind the either members of the joint Hindu family. On the other hand, the minor defendants through their guardian distinctly pleaded that they were not bound by the debt inasmuch as it had been contracted by defendants 1 and 2, if at all, for their own personal purposes and not for any family necessity. This point should undoubtedly have been put in issue, but unfortunately it appears to have been entirely overlooked. Mr. Tek Chand concedes for the purposes of this appeal that the family is a joint Hindu family, and his sole point is that plaintiff must fail because it has not proved that the debt was not one binding upon defendants 3 to 6. The case was badly conducted in the lower Court and we think it would be unjust to the plaintiff to decide the point against it without allowing an opportunity of proving, if it can, that the debt was contracted for a necessary purpose or that the money was used for the benefit of the family. Under O. 41, R. 25, we accordingly remand the following issue to the Subordinate Judge for trial and direct him to take the addittonal evidence required and thereafter to return the evidence to this Court together with his finding thereon and the reasons therefor:

"Was the promissory note Ex. P-4 executed by defendants 1 and 2 as agents or managers of the joint Hindu family, and was the sum of Rs. 15,000 borrowed by them from the plaintiff Bank for necessary or family purposes or was it used for the benefit of the family?"

The onus of proof will be on the plaintiff, but both parties should be called

upon to produce all the evidence available upon the point. A return should be made to this order within three months and objections must be filed, within 15 days of the receipt of notice from this Court to the effect that the return has been made.

R.M./R.K.

Case remanded.

### A. I. R. 1919 Lahore 252

SCOTT-SMITH, J.

*Mt. Amtul Qadir*—Defendant—Appellant.

v.

*Muhammad Yusaf*—Plaintiff—Respondent.

Second Appeal No. 3095 of 1917, Decided on 7th January 1919, from decree of Dist. Judge, Karnal, D/- 19th March 1917.

Civil P. C. (1908), S. 149—Appellant unable to pay court-fee within limitation on account of poverty should not be allowed to file appeal on insufficient stamp and then to pay balance at leisure—Poverty is not sufficient ground.

An appellant, who cannot on account of poverty pay the full court-fee on the appeal within the period of limitation prescribed for the filing of the appeal, should not be allowed to file the appeal on an insufficient stamp and then given time under S. 149 to pay the balance at his leisure. [P 252 C 1]

An appeal was filed a few days before the expiry of the period of limitation on 26th June 1917 upon an insufficient court-fee stamp. The memorandum of appeal was returned to the appellant on 29th June with the remark that the deficiency in the court-fee stamp should be made up. The memorandum was not re-filed until 17th November.

Held: that the appellant was not entitled to the benefit of the provisions of S. 149 and that the appeal was therefore barred by time. [P 253 C 1]

*Badr-ud-Din Kureshi*—for Appellant.

*Shamair Chand and Madan Gopal*—for Respondent.

**Judgment.**—This is an appeal from the order of the District Judge, Karnal, dismissing an appeal before him as barred by limitation. Lala Shamair Chand on behalf of the respondent raises a preliminary objection that the present appeal is also barred by time. The order appealed against is dated 19th March 1917 and the appeal was originally filed in this Court a few days before the expiry of the period of limitation on 26th June 1917 upon a court-fee stamp of Rs. 19-8-0. The decree appealed against was for Rs. 600 and the court-fee chargeable on the appeal was accordingly Rs. 45. The memorandum of appeal was therefore re-

(1) [1912] 21 P. R. 1912=11 I. C. 443.

(2) A. I. R. 1917 P. C. 61=39 All. 437=39 I. C. 280=44 I. A. 126 (P. C.).



turned on 29th June 1917 by the Deputy Registrar with the remark that the court-fee stamp was insufficient and counsel should note as to how he has calculated the value for purposes of court-fee. Nothing further was done by or on behalf of the appellant until 17th November 1917, when the appeal was refiled on a full stamp. S. 149, Civil P. C., allows the Court to extend time for payment of the whole or any part of the court-fee chargeable upon any document and the only question is whether the Court should in the present case extend the time. *Dalip Singh v. Umrao Singh* (1), was a case similar to the present, but in that case the appeal was not refiled till the expiry of one year after it had been returned to the appellant.

Mr. Kureshi on behalf of the appellant is unable to state how the court-fee of Rs. 19 8 0 originally paid was calculated. He suggests that that was all the money which was given to him and probably the appellant could not afford to pay the full court fee at the time when the appeal was first filed. It was held in *Moshaullah v. Ahmedullah* (2) and *Husaini Begam v. Collector of Muzffarnagar* (3) that poverty was not sufficient cause within the meaning of S. 5, Lim. Act, for an extension of the limitation period. In my opinion it would be an exceedingly bad precedent to hold that an appellant, who cannot pay the full court-fee within the period of limitation prescribed for the filing of an appeal, should be allowed to file an appeal on an insufficient stamp and should be given time to pay the balance at his leisure. It is not alleged that the insufficient court-fee was paid in the first instance through a bona fide mistake. I am quite clear that no bona fide mistake was made and also that no due diligence was used in making up the full court-fee chargeable on the memorandum of appeal. The appellant no doubt in the lower appellate Court applied for leave to appeal in forma pauperis, but when her application was finally rejected and she was allowed time to make up the court-fee within a week she did so. I see no reason to suppose that full court-fee could not have been paid in the first instance and I therefore do not think that it is a case in which the Court should

extend the time under S. 149, Civil P. C. The appeal is accordingly dismissed with costs.

R.M./R.K.

*Appeal dismissed.*

### A. I. R. 1919 Lahore 253

SCOTT-SMITH AND MARTINEAU, JJ.

*Bhagwan Das* — Defendant — Petitioner.

v.

*Allah Bakhsh* — Plaintiff — Opposite Party.

Civil Revn. No. 337 of 1915, Decided on 5th August 1918, from decree of Small Cause Court Judge, Lahore, D/- 7th April 1915.

Civil P. C. (5 of 1908), O. 21, Rr. 91, 92 and 93—Judgment-debtor having saleable interest—No suit for refund of purchase money by auction purchaser lies—He can get refund only when sale is set aside under R. 92.

A suit brought by a purchaser at a sale in execution of a decree for the refund of a portion of the purchase money is not maintainable where it is found, as required by O. 21, Rr. 91, 92 and 93, that the judgment-debtor had a saleable interest in the property sold. It is only where a sale is set aside under R. 92, O. 21 of the Code that the auction purchaser can obtain an order for the refund of the purchase money under R. 93.

[P 253 C 2; P 254 C 1]

*Parduman Das*—for Petitioner.

**Judgment.**—The plaintiff purchased a house in execution of a decree obtained by Bhagwan Das against Abdur Rahman and paid the price. On a suit brought by the judgment debtor's sons it was held that they were the owners of  $\frac{3}{4}$ ths of the house. The plaintiff has consequently sued for the refund of  $\frac{3}{4}$ ths of the price, and the Judge of Small Cause Court has given judgment in their favour, following *Fazal Ilahi v. Muhammad Jan* (1). Bhagwan Das has applied to this Court for revision, and it is contended on his behalf that the suit is not maintainable. This contention is supported by *Gurdit Singh v. Ghanaya Lal* (2), in which it was held that a suit brought by a purchaser for the refund of a portion of the purchase money was not maintainable when it was not found, as required by S. 315, Civil P. C., (old), that the judgment-debtor had no saleable interest in the property.

In the case followed by the lower Court, which was decided by a single Judge, the learned Judge pointed out that whereas S. 315 of the old Civil Procedure Code contained a stipulation

(1) [1913] 55 P. R. 1913=19 I. O. 793.

(2) [1886] 13 Cal. 78.

(3) [1897] 9 All. 655.

(1) [1913] 18 I. O. 795.

(2) [1908] 114 P. R. 1908.



that it must be found that the judgment-debtor had no saleable interest in the property sold, nothing was said about this in R. 93, O. 21 of the present Code; and he held that under the present law an auction purchaser was entitled to recover his purchase money, or some part of it, even when the judgment-debtor had some saleable interest in the property. That finding was really an obiter dictum, as the auction purchaser's petition for revision was dismissed on account of the delay in presenting it. Moreover, in coming to that finding the learned Judge omitted to notice that the effect of R. 93, O. 21 of the present Code, read with the two preceding rules, was really the same as that of S. 315 of the old Code. O. 21, R. 93 of the present Code, entitles the purchaser to an order for payment of his purchase money where the sale is set aside under R. 92. R. 92 provides for the sale being set aside where an application under R. 89, R. 90, or R. 91 is made and allowed. R. 91 provides that the purchaser may apply to the Court to set aside the sale on the ground that the judgment-debtor had no saleable interest in the property sold. Reading Rr. 91, 92 and 93 together, it is clear that the present Code has made no change in the law, on the subject of a purchaser's right to a refund. We hold therefore following *Gurdit Singh v. Ghanaya Lal* (2), that the suit is not maintainable.

We hold further that the suit must fail also by reason of the fact that the sale has never been set aside. As has been held in *Nannu Lal v. Bhagwan Das* (3), it is only when the sale has been set aside under R. 92 that the auction purchaser can obtain an order for the refund of the purchase money under R. 93. We accordingly accept the application, set aside the decree of the lower Court, and dismiss the suit. As the case is a hard one for the purchaser, who has been deprived of  $\frac{2}{3}$ ths of the house while he has paid the price of the whole, we direct that the parties shall bear their own costs throughout.

R.M./R.K.

*Application accepted.*

## A. I. R. 1919 Lahore 254

SCOTT-SMITH, J.

*Ata Ali Khan and another*—Plaintiffs  
—Appellants.

v.

*Kala and others* — Defendants — Respondents.

Second Appeal No. 1913 of 1918, Decided on 30th January 1919, from decree of Dist. Judge, Attck, D/. 4th May 1918.

**Custom (Punjab)—Succession — House in abadi of non-proprietor—Near collateral (first cousin) can succeed.**

On the death of a non-proprietor in possession of a house in the village abadi, a near collateral of the deceased is entitled to succeed to the house as against the proprietors.

Where, therefore, plaintiff, a proprietor, sued for possession of a house in the abadi which belonged to one R., an occupancy tenant who died without any lineal descendant.

*Held:* that the defendant, a first cousin of the deceased, was entitled to succeed to the house  
9 I. C. 725, *Foll.* [P 255 C 1]

*B. A. Cooper*—for Appellants.

*Mohsin Shah*—for Respondents.

**Judgment.**—In the case out of which the present second appeal arises the plaintiff sued for possession of a house in the abadi which belonged to Raushan deceased, who held the land under him as an occupancy tenant and who died without any lineal descendant. The first Court held that in accordance with Art. 238-a, Rattigan's Digest, only the direct male descendants are entitled to succeed to a house of a non proprietor, and that therefore Kala, defendant, the first cousin of the deceased Raushan, was not entitled to succeed, the common ancestor Murid not being proved to have occupied the house. The lower appellate Court also found that it was not shown that the house was built by Murid the common ancestor of Kala and Raushan, but it was of opinion that as Raushan's fathers occupied the house and as a first cousin was not a remote collateral, and as it is very probable that the house was owned by Murid, a decree should not have been given to the plaintiff. It therefore dismissed the plaintiff's suit. In second appeal by the plaintiff Art. 238-a of Rattigan's Digest is again relied upon. Now what that article says is that direct male descendants will succeed to a non-proprietor's rights in a house occupied by him at the time of his death but not remote collaterals. It does not, however, say that near collaterals will not succeed. Certain authorities are

(3) [1917] 9 All. 111=37 I. C. 9.



quoted under this article and these were considered by Johnstone, J., in the case reported as *Kalu v. Pir Bakhsh* (1). The learned Judge in that case was of opinion that the rulings had gone a little further than the rule recorded by the author of the Digest. He says:

"It seems to me quite clear that the Judges who delivered those judgments intended to hold that in such a case as the present near collaterals would succeed to the occupation of the houses."

He further stated that in *Wali Muhammad Khan v. Mt. Surji* (2) the dispute was between a nephew and the proprietor of the village and the dispute was decided in the nephew's favour. In that case the learned Judge held that where a non-proprietor in possession of a house in the village abadi dies, his near collaterals are entitled to possession as against the proprietors. This view was followed in a subsequent case reported as *Kala v. Hasham* (3).

Mr. Cooper is unable to cite any authority wherein it was laid down that a near collateral cannot succeed to a house left by a non-proprietor in a village.

I am, therefore, of opinion that the decision of the lower appellate Court in this case is perfectly correct. Kala, as the first cousin of the deceased non-proprietor, is a very near collateral of his and in the absence of proof of any custom to the contrary, I hold that he is entitled to succeed. The appeal, therefore, fails and is dismissed with costs.

R.M./R.K. *Appeal dismissed.*

(1) [1911] 9 I. C. 735.

(2) [1888] 76 P. R. 1888.

(3) [1916] 35 I. C. 291.

### A. I. R. 1919 Lahore 255 (1)

SHADI LAL, J.

*Ralla Ram* — Appellant.

v.

*Amritsar Mutual Relief Fund, Ltd.* — Respondent.

Misc. Civil Appeal No. 212 of 1918, Decided on 23rd March 1918, from order of Dist. Judge, Lahore, D/- 4th January 1918.

Companies Act (7 of 1913), S. 202—Liquidation proceedings — Judge can review wrong order.

A Judge conducting liquidation proceedings is not precluded from recalling a wrong order and rectifying a mistake. [P 255, C 2]

*Moti Sagar*—for Appellant.

*S. K. Mukerji*—for Respondent.

**Judgment.**—The District Judge has passed an order under S. 162, Companies

Act, 1882, summoning the appellant to appear in Court and give information concerning certain transactions entered into by him as the voluntary liquidator of the Company. Mr. Moti Sagar seeks to impeach that order on the ground that one of the matters to be inquired into by the District Judge has already been disposed of by a previous order passed by Bhai Umrao Singh, and that the District Judge is not competent to reopen the same question. I am not prepared to accede to this contention. Apart from the reasons given by the learned Judge, which in my opinion are sound I consider that a Judge conducting the liquidation is not precluded from recalling a wrong order and rectifying a mistake: vide Civil Appeal No. 2421 of 1916. The judgment in *Mussoorie Bank Limited v. Himalaya Bank Limited* (1) lays down the rule that S. 169, Companies Act, was not intended to refer to a case in which a Judge upon the discovery of fresh matter considers it expedient to pass a fresh order or to review an order passed by him. It is to be observed that this view of the matter is in accordance with the procedure followed by the English Courts in similar circumstances: vide *In re National Assurance and Investment Association Ex parte Munday* (2).

For these reasons I do not think there is any sufficient reason for my interference with the order of the lower Court. I accordingly dismiss the appeal with costs.

R.M./R.K. *Appeal dismissed.*

(1) [1894] 16 All. 53.

(2) [1862] 31 Beav. 203.

### A. I. R. 919 Lahore 255 (2)

BROADWAY, J.

*Pohlo Ram and others* — Appellants.

v.

*Hukam Singh & another* — Respondents.

Second Appeal No. 1068 of 1918, Decided on 21st June 1918, from decree of Dist. Judge, Jullundur, D/- 7th January 1918.

Malicious Prosecution—Essentials—Proof of favourable termination of criminal proceedings is not sufficient—Charges must be shown to have been unfounded—Burden of proving innocence is greater where prosecution is dismissed on technical grounds.

In a suit for damages for malicious prosecution the plaintiff must call evidence to prove that he was innocent of the charge that had been brought against him and that it had been brought



without reasonable and probable cause. Merely to show that the criminal proceedings terminated in his favour is not enough.

Where the criminal case is dismissed on a technical ground, it is still more incumbent on the plaintiff to establish his innocence.

[P 256 C 1]

*Rambhaji Datta*—for Appellant.

*Sewaram Singh* and *Nihal Chand*—for Respondents.

**Judgment.**—Owing to the manner in which the learned District Judge had dealt with this case I found it necessary to remand the case for a fresh hearing and decision. The case has now been decided afresh by the successor of the former District Judge and the suit of the plaintiff has been dismissed on the ground that, although there was no reasonable and probable cause for the prosecution of the plaintiffs — and that the prosecution had been maliciously launched — the plaintiffs had failed to prove that they were innocent. In coming to this finding the learned District Judge relied on *Abrath v. North Eastern Ry.* (1), which had been followed in *Mg Tha Hla v. Mokhlis* (2) and *Nalliappa Goundan v. Kaliappa Goundan* (3).

Choudhri Rambhaji Datta referred me to *Crowdy v. L. O'Reilly* (4) and *Venu v. Coorya Narayan* (5) and also read Rattan Lal on Torts, p. 257. Sardar Singh on the other side cited *Sheik Muchi Osta v. Horsmull Marwari* (6) and *Padashin v. Maung Lun* (7) and also referred to Rattan Lal on Torts, p. 221. The general consensus of authorities seems to be in favour of the view taken by the learned District Judge and the gist of the decisions is that, in a suit of this nature, the plaintiff must call evidence to prove that he was innocent of the charge that had been brought against him and that it had been brought without reasonable and probable cause, merely to show that the criminal proceedings terminated in his favour being not enough. In the present instance the criminal case was dismissed on a technical ground and therefore it was still more incumbent on the plaintiffs to establish their innocence. This they have not even attempted to do

and I am not prepared to allow them any further opportunity. The sooner this litigation comes to an end the better it will be for the parties concerned. I accordingly dismiss this appeal but direct the parties to bear their own costs

R.M./R.K.

*Appeal dismissed.*

### A. I. R. 1919 Lahore 256

CHEVIS AND ABDUL RAOOF, JJ.

*Harnam Singh*—Convict—Appellant.

v.

*Emperor*—Opposite Party.

Criminal Appeal No. 747 of 1918, Decided on 31st January 1919, from order of Sessions Judge, Hissar, D/- 21st October 1918.

Penal Code (1860), Ss. 34, 111 and 394 — Robbery committed by four persons—Death caused by one alone—Other accused cannot be convicted of murder by reason of S. 34—Applicability of S. 111 discussed—Other accused held guilty under S. 394.

A robbery was committed by four men: two, one of whom was the accused, went from house to house bullying and ill-treating the inmates and making them give up their valuables, while the other two kept guard on the housetops. Of the latter pair one was armed with a gun which he fired off several times, and towards the close of the affair when the villagers began to make it unpleasant for the robbers by stone throwing, he aimed at one of the villagers who took a prominent part in stone throwing, and shot and killed him. The accused, having been convicted of murder, appealed to the Chief Court:

*Held:* (1) that inasmuch as the fatal shot was fired by one man alone, the accused could not be convicted of murder by reason of S. 34; (2) that in order to apply S. 111, it must be found (a) that the appellant was an abettor of the robbery and (b) that the murder was a probable consequence of the abetment and was committed in pursuance of the conspiracy to commit the robbery; (3) that the appellant was one of the principals in the robbery and not merely an abettor; (4) that even assuming that he was an abettor, it could not be said that murder was a probable consequence of the abetment to commit robbery; (5) that the accused was guilty of an offence under S. 394. [P 258 C 1,2]

*Gullu Ram*—for Appellant.

*Mul Chand*—for the Crown.

**Judgment.**—The appellant Harnam Singh has been convicted of the murder of Umar Hyat and sentenced to death. The case is before us on appeal, and also under S. 374, Criminal P. C., for orders as to confirmation of the death sentence. The murder in question occurred in the course of a robbery which took place in the houses of Jainti, Santu and Ishari at Badalgarh soon after sunset on 9th November 1917. The facts of the robbery are related at length in the judgment of

(1) [1883] 11 Q. B. D. 440.

(2) [1915] 31 I. C. 324.

(3) [1901] 24 Mad. 59.

(4) [1913] 18 I. C. 737.

(5) [1881-82] 6 Bom. 376.

(6) [1913] 19 I. C. 24.

(7) [1915] 8 L. B. R. 78=29 I. C. 883.



the learned Sessions Judge, and it is unnecessary to repeat them in full detail here. Briefly it may be said that the robbery was committed by four men; two, one of whom is alleged to be the appellant, went from house to house, bullying and ill-treating the inmates and making them give up their valuables, while the other two kept guard on the house tops. Of the latter pair one was armed with a gun, which he fired off several times, and towards the close of the affair, when the villagers began to make it unpleasant for the robbers by throwing stones he aimed at Umar Hyat, who was taking a prominent part in the stone throwing, and shot and killed him. The robbers then made off with their booty.

The manner in which the investigating police came to the conclusion that Harnam Singh was one of the robbers and arrested him in Calcutta in April 1918 is described in the judgment of the learned Sessions Judge. That the robbery and the murder took place as described by the witnesses is not denied, and the only question of fact arising for decision in this appeal is whether it has been proved that the appellant is one of the four robbers. On this point the principal evidence is that of Lekhu, son of Jainti, Ganeshi, brother of Santu, Mt. Gangi, wife of Lekhu, and Mt. Rakhi, wife of Ishari, who all swear to the appellant as one of the two who committed the actual robbery while their two companions mounted guard on the housetops. Their is reliable evidence as to these four witnesses having picked the appellant out of a group of men in the Hissar Jail in the presence of Rai Gopal Das, Treasury Officer. We see no reason whatever to suppose that the identification was not perfectly genuine. It is urged that the police may have allowed the witness as opportunity of seeing the appellant before the identification parade took place, or that the witnesses may have seen beforehand the other persons with whom the appellant was grouped. But if any tricks of this sort were to be played, how is it that Rura, Jainti and Santu were not also induced to identify the appellant? The robbers were in the houses of the witnesses for a considerable time, so we have no doubt that the witnesses had opportunity of noting their features, even though their faces were partially covered as the wit-

nesses admit. It might, of course, be urged that the appellant was picked out because he happens to resemble one of the robbers, but there is another incriminating evidence. After Harnam Singh was arrested, Karima was shut up with him in the lock up for the night, posing as a man arrested for cattle theft, and the next day Karima gave the police information which led to the house of Kanshi goldsmith and of appellant's wife and sister being searched. In possession of Kanshi and the appellant's sister were found ornaments which have been satisfactorily identified as part of the loot. Kanshi Ram (P. W. 42), no doubt, claims the ornaments found in his possession as his own, though he admits certain dealings with appellant's father in the Diwali of 1917. But Mt. Ratno, sister of the appellant (P. W. 35), admits that she got the ornaments from her brother, and in the absence of any good evidence to shew that she has been coerced into giving this evidence, we decline to suppose that she is giving false evidence against her own brother.

So we have not only identification by four of the victims of the robbery but also evidence proving his connexion with part of the ornaments looted in the robbery. It is unnecessary now to dwell on the evidence of Karima and Sharfu. We may however remark that Karima's story of the booty having been divided in his presence and of his being told that it was stolen property may easily be true, but points strongly to his being an associate of the culprits. Further, according to his own showing he withheld the name of one of the real culprits when he first gave information to the police, and he appears to us to be a man on whose uncorroborated evidence it would be dangerous to place reliance. As to Sharfu all that his evidence proves is that about the time of the robbery he saw the appellant and two other Sikhs in Banawali a village a long way off from the scene of the robbery. The evidence of the two defence witnesses is not worth comment. We hold it clearly proved that the appellant is one of the four men who committed the robbery.

Next comes the question what offence he is guilty of. He was not the man who fired the gun and killed the deceased. The learned Sessions Judge has applied S. 34, I. P. C., but we are of opinion that



this section is frequently misapplied and we do not consider it applicable to the present case. The section runs thus:

"When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."

Thus if two men were jointly to beat a man to death each of the two would be liable, though he alone had not caused death. But here there is no question of an act causing death being done by several persons. The fatal shot was fired by one man alone, and if the appellant is to be convicted of the murder it must be not by reason of S. 34, I. P. C., but as an abettor. We note that in many such cases the difficulty of fixing responsibility on to all the gang does not arise, because such robberies are often committed by gangs of 5 or more men, and then S. 149 is applicable—a section which goes much further than S. 34, as it relates not merely to acts done in furtherance of the common object but also to such acts as the offenders knew to be likely to be committed in furtherance of that object. There is also S. 396, I. P. C., which lays down that if any one of 5 or more dacoits commits a murder in the course of the dacoity, every one of the dacoits may be punished with death. Here however there were only four culprits, so neither S. 149 nor S. 396 can be applied. The question remains whether the appellant is guilty of abetment of the murder. The appellant knew, of course, that one of his comrades was armed with a gun, and it must be presumed that he knew, not merely that the gun would be fired off to frighten the villagers but that it might be used in case of necessity to effect the escape of the robbers by causing death. But there was presumably no intention formed beforehand of killing anybody. Several shots were fired, but seeing that only one at the very end of the affair took effect, it would appear that the earlier shots were not intended to hit. And the two robbers inside the house only inflicted simple hurts. So we can scarcely hold that the appellant instigated the fatal shot, or engaged in a conspiracy for it to be fired or aided the firing of that shot. On behalf of the Crown S. 111, I. P. C., is quoted, and it is urged that the fatal shot was a probable consequence of the robbery. S. 111 runs as follows:

"When an act is abetted and a different act is done, the abettor is liable for the act done in the

same manner and to the same extent as if he had directly abetted it, provided the act done was a probable consequence of the abetment, and was committed under the influence of the instigation or with the aid or in pursuance of the conspiracy which constituted the abetment."

So in order to apply S. 111 to the present case we shall have to find (1) that the appellant was an abettor of the robbery, and (2) that the murder was a probable consequence of the abetment and was committed in pursuance of the conspiracy to commit the robbery. Now the appellant was one of the principals to the robbery and not merely an abettor, and the section as formed and the illustrations which accompany it seem to point merely to abettors. But illustrations are not exhaustive, and it may be argued with some force that when two or more persons jointly commit an offence each of them is not merely a principal, but is also an abettor of his companions since he is aiding them in the doing of the act. We need not, however, decide this point since we are not prepared to hold that the murder was a probable consequence of the abetment to commit robbery. When the chances are in favour of a certain event happening, then that event is probable; when the chances are against its happening, it is improbable. When the chances are even, we get the middle line between probability and improbability. Improbability, if increased to the extreme limit, becomes impossibility; probability if increased to the limit becomes certainty. The halfway line is neither probability nor improbability. Now in robbery of this kind, when there is no previous enmity of any sort firearms are taken with the main object of frightening the villagers, and it is not the intention of the robbers to use the firearms with deadly effect, unless it should be necessary to do so in order to effect their escape. If the appellant and his comrades had been asked by a friend shortly before the robbery what were the odds on a murder being committed during the course of that robbery, we imagine that they would have said the odds were against anybody being killed. And we think that such an answer would have been right. Many such robberies take place without anyone being killed. We do not, however, mean to lay down any general rule as to probabilities in such cases; every case must be judged as far as possible on its own merits. We cannot, therefore, uphold



the conviction of murder by reason of S. 111.

But S. 394 is clearly applicable; this section provides that if any person in committing robbery voluntarily causes hurt, he and any other person jointly concerned in committing the robbery shall be punished with transportation for life or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fine. We think the maximum sentence allowed by this section should be passed. Robberies by armed gangs at night require rigorous repression, as the legislature clearly recognizes when providing special punishments for gangs of five or more persons committing such offences. Here the gang just fell short of five, and so the offender is not liable to the death sentence to which he would otherwise have been liable under S. 396. We so far accept the appeal as to alter the conviction to one under S. 394, and the sentence to one of transportation for life.

R.M./R.K.

*Sentence reduced.*

### A. I. R. 1919 Lahore 259

ABDUL RAOOF, J.

*Mt. Murad Bibi* — Plaintiff—Appellant.

v.

*Umar Din and others*—Defendants—Respondents.

Misc. First Appeal No. 3179 of 1917, Decided on 1st February 1919, from order of Senior Sub-Judge, Lahore, D/- 2nd November 1917.

(a) Guardians and Wards Act (8 of 1890), Ss. 9 (1), 47 (b), 48—Application for appointment of guardian—Application returned for presentation to proper Court—Appeal does not lie.

An order made under Cl. 1, S. 9, returning an application for appointment as guardian of a minor for presentation to a Court having territorial jurisdiction, is not appealable. [P 260 C 1]

(b) Civil P. C. (1908), S. 115—Different remedy open—High Court will not interfere.

The High Court will not exercise its extraordinary powers of revision where other remedies are open to a petitioner, nor in all cases where a question of jurisdiction is raised.

[P 260 C 1]

*Imam Din*—for Appellant.

*Amar Nath Monga*—for Respondents.

**Judgment.**—This is a first appeal from an order under the Guardians and Wards Act. The facts out of which it has arisen are: One Khuda Bakhsh, a resident of the District of Amritsar, died leaving a widow and two little minor

girls, Ta Bibi and Lachmi. The age of the latter is only seven years and that of the former about 11 years. Shortly after the death of Khuda Bakhsh his widow Mt. Ajhunda also died and the children were left alone in the house. Mt. Murad Bibi, the maternal grandmother of the minors, who lives in the District of Lahore, then went to Amritsar and brought the girls to her own house. They arrived at Lahore on 23rd June 1917 and ever since then have been living with their maternal grandmother and under her care and protection. On 11th July 1917 after the girls had been with her for less than a month Mt. Murad Bibi made an application to the Court of the District Judge of Lahore under the Guardians and Wards Act, asking the Court to appoint her the guardian of the person and property of the minors. She mentioned in the application the names of other persons who are related to the minors. They were (1) Umar Din, and (2) Ghulam Muhammad, nephews of Khuda Bakhsh, being the sons of his brother Nur Muhammad, deceased, and (3) Pir Muhammad, (4) Ata Muhammad, and (5) Maula Bakhsh, the brothers of Mt. Ajhunda, the deceased mother of the minors.

The application was transferred to the Court of the Senior Subordinate Judge of Lahore by an order dated 17th July 1917. Notice of the application was sent to the relations mentioned in the application. The maternal uncles did not raise any objection but the nephews of Khuda Bakhsh orally raised an objection on 2nd November 1917 to the effect that the application should have been made to the District Court of Amritsar where the minors "ordinarily resided" and where the property of the minors was situated; S. 9, Cl. (1), of the Act was relied upon. The Senior Subordinate Judge, Ganga Ram, held that the ordinary residence of the minors being at Amritsar he had no jurisdiction to entertain the application. He ordered that the application be returned for presentation to the Court at Amritsar. Against this order the present appeal has been filed. A preliminary objection is taken to the hearing of the appeal, on the ground that an order made under Cl. 1, S. 9 of the Act is not appealable. Cl. (b), S. 47, allows an appeal from an order made under S. 9 sub-S. (3), returning an application,



Apparently it was not intended by the legislature to allow an appeal under sub-S. (1), S. 9. I am therefore constrained to hold that the present appeal does not lie.

I am asked by the learned counsel of Mt. Murad Bibi, the appellant, to treat the memorandum of appeal in this case as a petition for revision and to set aside the order of the learned Senior Subordinate Judge returning the application. He relies on the provisions of S. 48 of the Act and argues that this Court is competent to take up the matter on its revisional side and pass a proper order. Powers of revision however are not to be exercised in all cases where a question of jurisdiction is raised. It has been repeatedly held that where other remedies are open to a petitioner the extraordinary powers of revision are not to be exercised. In this case the appellant can present her application for the appointment of a guardian in the Court at Amritsar. No doubt she will be put to some inconvenience as is argued by the learned counsel, but that is no reason for the exercise of this exceptional power. I therefore refuse to accede to the prayer of the learned counsel and dismiss the appeal with costs.

R.M./R.K. *Appeal dismissed.*

### A. I. R. 1919 Lahore 260

RATTIGAN, C. J.

*Gopi Chand* — Judgment-debtor—Appellant.

v.

*Benarsi Das* (Decree-holder) and another (*Auction purchaser*)—Respondents.

Misc. First Appeal No. 579 of 1919, Decided on 10th November 1919, from order of Senior Sub-Judge, Ambala, D/- 25th February 1919.

(a) Civil P. C. (1908), O. 21, Rr. 90 and 67 — Application to set aside sale—Advertisement of sale in Gazette is not necessary — Absence of direction for advertisement is not material irregularity under R. 90.

Order 21, R. 67 (2), merely provides that an executing Court may in its discretion, direct an advertisement of a sale to be published in the Gazette, but there is no obligation on its part to do so, and the failure to give such a direction does not amount to material irregularity in the conduct of the sale within the meaning of R. 90 of the Order. [P 261 C 1]

(b) Civil P. C. (1908), O. 21, R. 90—Material irregularity must result in substantial loss.

A judgment-debtor applying under O. 21, R. 90, to set aside an execution sale must show not only that there has been material irregularity in the conduct of the sale but also that such irregularity has resulted in substantial injury to him. [P 262 C 1]

(c) Civil P. C. (1908), O. 21, R. 90—Application to set aside sale — Objections not stated in application cannot be entertained by appellate Court.

An execution Court should not consider objections other than those expressly stated in the application presented to it under O. 21, R. 90. A fortiori objections not so taken cannot be considered by an appellate Court, when hearing an appeal from the order of the Court rejecting an application to set aside a sale. [P 261 C 2]

*Jai Gopal Sethi* and *Jagan Nath*—for Appellant.

*Manohar Lal* and *Gullu Ram*—for Respondents.

**Judgment.**—This is an appeal from the order of the Senior Subordinate Judge Ambala, rejecting an application under O. 21, R. 90, Civil P. C., by the judgment-debtor to set aside an auction sale on the ground of irregularities in proclaiming and conducting it. The facts so far as they are material for the purposes of the appeal before me, are briefly as follows: In 1912 the decree-holder, Benarsi Das, applied for execution of a decree for Rs. 17,640 which he held against the judgment-debtors Gopi Chand and others, and prayed for attachment and sale of the rights which the judgment-debtors possessed as mortgagees in a certain bungalow and garden situate in the town of Jagadhri. The application was granted and the property attached was sold in 1913, but the sale was subsequently set aside on the application of the judgment-debtors. A second sale in July 1915 and a third sale in December 1916 both in favour of the decree-holder who had bid Rs. 11,000 for the property were also set aside, and a similar fate befell a fourth sale in December 1918 in favour of Sardar Lachhman Singh who had bid Rs. 13,000. All these sales were cancelled on the application of the judgment-debtors, and finally on 13th January 1919 a fifth sale, when the property again realized Rs. 13,000, was effected in favour of the said Sardar Lachhman Singh. The judgment-debtors applied as usual for cancellation of the said sale, and the objections urged by them on the ground upon which their application was based in the Court executing the decree were as follows:



(1) That the auction sale was not duly proclaimed by beat of drum. This objection is not in accordance with the facts as the proclamation of sale was duly made by that means, and Mr. Jai Gopal Sethi, while admitting that the proclamation was duly made, explains that the real objection was that there was no beat of drum at the time when the sale actually took place. Assuming that this was so, I can find no irregularity as there is no provision of law making it incumbent upon a Court to have a drum beaten while the sale is going on; (2) that the sale was very hurriedly conducted and was concluded in two hours. Here again the objection is contrary to the facts, as the sale was proclaimed on the date fixed from 10 a. m. till 5 p. m., when the last bid of Rupees 13,000 was made and accepted; (3) that the property is of great value and that in order to notify the residents of the neighbouring Kalsia State and Saharanpur, who would have been the likely purchasers, it was necessary to advertise the sale in the Gazette. Reference in this connexion is made to O. 21, R. 67 (2), Civil P. C., but the Code merely provides that the Court may in its discretion direct an advertisement of the sale in the Gazette and there is no obligation on its part to do so; (4) that in the proclamation of sale neither the khasra numbers nor the amount of revenue nor the area of the land was specified. This objection ignores the fact that the bungalow and garden are not agricultural land or assessed to revenue.

No doubt the area of the property was not specifically stated, but in view of the fact that four previous sales had taken place and that few, if any persons in the neighbourhood could have been unaware of the exact property that was being sold, I cannot agree that the omission in this particular instance to specify with accuracy the details of the property amounted to a material irregularity; (5) that the decretal amount as stated in the proclamation is said to be Rupees 17,500, whereas the proper amount due to the decree-holder under the decree of the appellate Court which awarded him costs was Rs. 20,217-3-4. As regards this objection I agree with the Subordinate Judge that the judgment-debtor was in no way prejudiced by the inaccuracy, inasmuch as the probabilities are that more persons would be inclined to buy

the property upon which the decree-holder had a lien for Rs. 17,500 than would be likely to purchase the property upon which the lien amounted to over Rupees 20,200. If anyone was injured by a mistake of this kind, it was the auction-purchaser and not the judgment-debtor, and the former is satisfied with his bargain; (6) that the agricultural land should have been sold in a separate lot from that in which the bungalow was included and that the sale of both properties in one lot greatly decreased their value. The answer to this objection is that there is no "agricultural land" and that the land surrounding the house and appurtenant to it is a garden. It is also pointed out by Mr. Gullu Ram that it was at the express request of the decree-holder and the judgment-debtor made at the time when the property was first attached, that the garden and bungalow were sold in one lot and not separately. This objection therefore also fails.

The foregoing are the only objections taken to the application made to the Court executing the decree, but before me Mr. Jai Gopal Sethi wished to urge further on the judgment-debtors' behalf that the sale was invalid: (a) because no notice had been given to the judgment-debtors; (b) that one-fourth of the property sold belonged not to the judgment-debtors but to their relation Mt. Pishto, and (c) that the value of the judgment-debtors' mortgagee rights in the property had not been specified in the proclamation of sale. Assuming that there might have been force in these objections or any one of them, I have no hesitation in holding that they cannot be urged at this stage of the case. The Allahabad High Court has held and if I may venture to say so rightly, that the Court should not consider objections other than those expressly stated in the application presented to it under R. 90, O. 21, Civil P. C., *Harbans Lal v. Kundan Lal* (1). A fortiori objection not so taken cannot be considered by an appellate Court when hearing an appeal from the order of the Court rejecting an application to set aside a sale. Mr. Gullu Ram has also urged that it was incumbent upon the judgment-debtors to adduce evidence to prove that they had suffered substantial injury owing to the alleged irregularities in the proclamation and conduct of the sale,

(1) [1890] 21 All. 140.



whereas in point of fact no evidence whatever was given go show that either directly or by necessary implication such substantial injury had been caused. On this ground also the appeal before me must fail, as there is the highest authority for holding that in cases such as the present the judgment-debtors must show not only that there had been material irregularities but also that such irregularities had resulted in substantial injury to them.

The appeal is dismissed with costs.  
R.M./R.K. *Appeal dismissed.*

**\* A. I. R. 1919 Lahore 262**

MARTINEAU, J.

*Mt. Ghulam Fatima*—Plaintiff—Appellant.

v.

*Rahman*—Defendant—Respondent.

Second Appeal No. 2794 of 1918, Decided on 8th March 1919, from decree of Dist. Judge, Mianwali, D/- 30th August 1918.

(a) Mahomedan Law — Marriage—Minor girl—Marriage by de facto guardian—Minor girl on attaining puberty can repudiate—In such suit benefit of girl or qualification of next friend are immaterial.

A minor Mahomedan girl who has not been given in marriage by her father or grandfather has an absolute right to repudiate the marriage on attaining puberty. Questions as to the character of the next friend of the plaintiff or as to whether the annulment of the marriage would be beneficial to the plaintiff are beside the point. All that has to be seen in such a suit is whether the plaintiff repudiates the marriage and wants it to be annulled. [P 263 C 1]

(b) Mahomedan Law — Marriage—Minor girl—In suit for annulment of marriage girl attaining puberty during suit—No amendment is necessary and claim can be decreed—Civil P. C., (1908), O. 6, R. 17.

Plaintiff, a minor Mahomedan girl wishing to exercise her option of puberty, sued for the annulment of her marriage with the defendant. It appeared that she attained puberty during the pendency of the suit:

*Held:* that no amendment of the plaint was necessary and that as the plaintiff had attained the age of puberty, she was entitled to repudiate the marriage and should be given a decree. [P 262 C 2, P 263 C 1]

(c) Mahomedan Law—Marriage—Minor girl—Decree for annulment of marriage can be given even though cause of action has arisen after suit.

A plaintiff can be given a decree even where the cause of action arises after the filing of the suit. [P 263 C 1]

*M. L. Puri*—for Appellant.

*Abdul Rashid*—for Respondent.

**Judgment.**—The plaintiff, a minor Mahomedan girl, who was married to the

defendant by her mother after her father's death, wishes to exercise her option of puberty and sues for the annulment of the marriage. The suit has been dismissed as premature, the Courts below having concurred in finding that at the time when it was instituted the plaintiff had not attained puberty. She has appealed to this Court. In the first Court the plaintiff made a statement according to which she had attained puberty. The Court regarded this as inconclusive, but the plaintiff was afterwards examined by an Assistant Surgeon whose certificate filed in the lower appellate Court, supported her statement. There seems to be no doubt, and it is in fact not denied that the plaintiff even if she had not attained puberty when she brought the suit, attained it while the case was pending, and there appears to be no necessity to remand the case for the Assistant Surgeon's evidence to be taken. The question is whether although the suit may have been premature, the plaintiff should not be given a decree, a cause of action having arisen during the pendency of the suit. The learned District Judge considered the question of allowing an amendment of the plaint, and referred to rulings on the subject, but concluded by dismissing the appeal. In *Sita Ram v. Ram Chandra* (1) it was held in a suit for money, where the money became payable to the plaintiff after the institution of the suit, that the Court should pass a decree and not compel the plaintiff to institute another suit for the purpose.

In *Nur Khatun v. Sumar Sawayo* (2) it was held that there was nothing in the Civil Procedure Code to debar the Court from allowing an amendment of the plaint so as to include a claim on a cause of action based on an event which occurred subsequently to the institution of the suit. In *Gurdit Singh v. Mt. Parmeshri* (3) a suit for possession had been brought during the lifetime of a widow, and objection was taken that it was premature. During the pendency of the suit the widow died and it was held that an amendment of the plaint should have been permitted in the interests of justice, in order to prevent further litigation between the parties. In the present case no amendment even is necessary, and I

(1) [1918] 26 P. R. 1918=44 J. C. 863.

(2) [1915] 9 S. L. R. 61=31 I. C. 7.

(3) [1913] 19 I. C. 928.



fail to see why now that the plaintiff has attained the age of puberty and is entitled to repudiate the marriage she should not be given a decree, instead of being compelled to bring a fresh suit. Counsel for the respondent has contended that the marriage cannot be annulled unless shown to be unsuitable, but this contention is wrong. The minor not having been given in marriage by her father or grandfather, has an absolute right to repudiate the marriage on attaining puberty. Questions as to the character of the next friend of the plaintiff, on which the trial Court made some remarks, and as to whether the annulment of the marriage would be beneficial to the plaintiff are beside the point. All that has to be seen is whether the plaintiff repudiates the marriage and wants it to be annulled. It is plain from the statement she made before the trial Court that she does. She is consequently entitled to a decree and I think that she should be given the decree in this case and not be required to bring a fresh suit. I accordingly accept the appeal, set aside the decrees of the lower Courts and pass a decree annulling the marriage between the parties. As the suit was found to be premature the parties will bear their own costs in the first Court, but I direct that the defendant shall pay the plaintiffs' costs in this Court and the lower appellate Courts.

R.M./R.K.

Appeal allowed.

## A. I. R. 1919 Lahore 263

SCOTT-SMITH, J.

Gusaun Mal and others—Plaintiffs—Appellants.

v.

Ram Rakha Mal and others—Defendants—Respondents.

Second Appeal No. 1747 of 1916, Decided on 4th January 1919, from decree of Dist. Judge, Hoshiarpur, D/- 21st April 1916.

(a) Civil P. C. (1908), O. 1, R. 10—Power to add is wide—Bona fide mistake however must be shown.

Order 1, R. 10, gives very wide powers to a Court in the matter of substituting or adding a plaintiff. The power is however only to be exercised if the Court is satisfied that the suit was instituted through a bona fide mistake.

[P 264 C 1]

(b) Civil P. C. (1908), O. 1, R. 10—Suit on mortgage by N—Defendants pleading that N was benamidar for others—Plaint amended showing N as defendant—On appeal suit dismissed as present plaintiff had admitted in another suit that transaction was not

benami and they had no interest—Deed being benami there was bona fide mistake as to who should sue—Substitution was proper—Previous suit not being between same parties doctrine of estoppel did not apply—Evidence Act (1 of 1872), S. 115.

One N filed a suit for recovery of a certain sum as principal and interest on the security of a mortgaged shop, but a preliminary objection having been taken that the deed was benami and that the real mortgagees were G and his brothers, the trying Court ordered that they should be made plaintiffs and N made a defendant and returned the plaint for amendment, which was accordingly amended and refiled. A decree having been passed in the plaintiffs' favour, two separate appeals were filed, one by the representative of the original mortgagor and the other by the sons of one B who had purchased the shop in execution proceedings. The appellate Court dismissed the suit on the ground that in a previous suit the present plaintiffs had stated that the mortgage deed now sued upon had not been written benami and that they had nothing whatever to do with it. The plaintiffs filed a second appeal to the Chief Court:

*Held*. (1) that when a deed has been executed benami, there may well be a doubt as to who should actually bring the suit; (2) that brought the suit in his own name in a bona fide belief that he could maintain it and that therefore the first Court was justified in substituting the names of the present plaintiffs for that of N (3); that none of the present defendants having been parties to the previous suit and the statement of the present plaintiffs not having caused them to change their position in any way the plaintiffs could not be bound by anything they said in that suit and were not estopped from maintaining the present suit. [P 264 C 1, 2]

Tek Chand—for Appellants.

Nanak Chand and Gokal Chand Narang—for Respondents.

**Judgment.**—The suit out of which the present appeal arises was originally instituted by one Nathu Mal for recovery of Rs. 728.6.0 as principal and interest upon the security of a mortgaged shop, but it being admitted in the pleadings that Nathu Mal was only a benamidar the names of Gusaun Mal, Kirpa Ram and Munshi Ram were substituted as plaintiffs for that of Nathu Mal, who was made a formal defendant under the provisions of O. 1, R. 10, Civil P. C. A decree was passed in their favour by the first Court and two separate appeals were filed in the lower appellate Court; one by defendant 2, a representative of the original mortgagor and the other by defendants 4 to 7 who are the sons of Bishen Das, who purchased the shop in execution proceedings subject to Nathu Mal's mortgage. The lower appellate Court accepting the appeals dismissed the plaintiffs' suit and they have filed a second appeal to this Court. The ground

Advocate  
Jammu & Kashmir



upon which the lower appellate Court dismissed the plaintiffs' suit was that in a previous suit (*Gonda v. Gusaun Mal*) the present plaintiffs stated in their jawabdawa that the mortgage-deed now sued upon had not been written benami in favour of Nathu Mal and that they, Gusaun Mal and others, had nothing whatever to do with it. The Court in its judgment remarks :

" It is opposed to all principles of equity and law that a party may defend a suit on the ground that he has never executed nor had anything to do with the deed in suit, and then a few years later to bring a suit on the basis of the same deed, alleging that he was the real executant. "

The Court was further of opinion that the provisions of O. 1, R. 10 (1), Civil P. C., only applied when there had been a bona fide mistake, which in its opinion was certainly not the case in the present suit. It is common ground that the mortgage-deed was executed benami in favour of Nathu Mal, the real mortgagees being Gusaun Mal and his brothers. Defendants 4 to 7 filed preliminary objections to the effect that the deed was benami, that the real mortgagees were Gusaun Mal and others and that Nathu Mal had no cause of action. Upon this the trying Court ordered that Gusaun Mal and his brothers should be made plaintiffs and Nathu Mal a defendant and returned the plaint that it should be amended accordingly. The plaint was amended but Nathu Mal was retained in it as co-plaintiff. The Court ordered a further amendment and then the name of Nathu Mal was struck off the list of plaintiffs and he was made a defendant. O. 1, R. 10, Civil P. C., gives very wide powers to a Court in the matter of substituting or adding a plaintiff. The power is however only to be exercised if the Court is satisfied that the suit is instituted through a bona fide mistake. The lower appellate Court, as already stated, is of opinion that there was no bona fide mistake in the present case. Now where a deed has been executed benami as in this case, there may very well be a doubt as to who should actually bring the suit. In *Yad Ram v. Umrao Singh* (1) it was held that the mortgagee named in a deed of mortgage is competent to sue in his own name for sale on the mortgage, though he is admittedly only a benamidar for some third person.

The same was the view taken in *Sachitananda Mohapatra v. Baloram Gorain* (2). The latter ruling was however distinguished in *Mohendra Nath Mookerjee v. Kali Prohsad Johure* (3), wherein it was held that a benamidar, as such, is not entitled to maintain a suit for recovery of possession of immovable property of which he is a mere benamidar. A different view however was adopted in *Nand Kishore Lal v. Ahmad Ala* (4) and *Yad Ram v. Umrao Singh* (1) and where different High Courts have differed as to the law, it is quite clear that a layman might not be sure whether he is entitled to sue or not. In other words. Nathu Mal and Gusaun Mal and his brothers might very easily have felt doubt as to whether Nathu Mal should sue in his own name or whether Gusaun Mal and his brothers should be the plaintiffs. I therefore see no reason for supposing that Nathu Mal did not bring the suit in his own name in a bona fide belief that he could maintain it. The first Court was therefore quite justified in substituting the names of Gusaun Mal and others as plaintiffs for that of Nathu Mal.

The lower appellate Court referred to a suit wherein in their pleas of 25th August 1905 Gusaun Mal and his brothers said that the mortgage deed in question had not been written benami in favour of Nathu Mal. The suit was one for partition of joint property and the plaintiffs in that suit showed the mortgage as part of their joint property. Gusaun Mal and his brothers however denied this ; now even assuming that their intention in making this denial was to defraud the then plaintiffs, I fail to see how they are estopped from now urging that they are the real mortgagees. None of the present defendants were parties to that suit, and the statement of Gusaun Mal and others has not caused them to change their position in any way. The explanation offered is that Nathu Mal advanced the money with which the mortgage was taken, and in 1905 when that suit was brought the debt was still outstanding against Gusaun Mal and others, and that therefore they considered that they were not entitled to the property mortgaged. That case was com-

(2) [1897] 24 Cal. 644.

(3) [1903] 30 Cal. 265.

(4) [1896] 18 All. 69.

(1) [1899] 21 All. 380.



promised and I quite fail to see how the plaintiffs can be bound in the present suit by anything which they said in that suit to which the present defendants were not parties. It is admitted in the present suit by all the parties that Gusaun Mal and his brothers are the real mortgagees, and under these circumstances it is difficult to see why they should not be allowed to maintain the suit. The lower appellate Court holds that the plaintiffs are not proved to be the real mortgagees, but when they were admitted to be the real mortgagees no further proof was required.

I therefore accept the appeal and setting aside the order of the lower appellant Court remand the case there for redecision of the appeals which were filed from the order of the first Court. Stamp in this Court will be refunded and other costs will be costs in the case.

R.M./R.K.

Case remanded.

### A. I. R. 1919 Lahore 265

CHEVIS AND ABDUL RAOOF, JJ.

*Mt. Kishni Bai and others*—Defendants—Appellants.

v.

*Budhu Ram and others*—Plaintiffs—Respondents.

First Appeal No. 1657 of 1915, Decided on 20th January 1919, from order of Addl. Judge, Multan, D/- 20th May 1915.

Civil P. C. (1908), O 20, R. 2—Absence of order of transfer—Judgment written by Judge after transfer—Decision is without jurisdiction—R. 2 applies only to pronouncement.

In a suit for possession by redemption of certain lands the plaintiff put in new pleas after arguments had been heard and the case had been fixed for delivery of judgment. These pleas having been admitted, additional issues were framed with regard to them and 1st June 1914 was fixed for taking further evidence. On this date the case was postponed to 29th June 1914 as the trial Judge was on leave. The subsequent proceedings showed that the Judge who started the trial of the case ceased to exercise jurisdiction in respect of it and that it was taken up by his successor. It appeared however that by a mutual agreement between the first Judge and his successor the case was again taken over by the former and tried by him. Arguments were heard on 8th January 1915 and judgment was reserved. In the meantime the Judge was transferred from the district but he decided the case and wrote his judgment on 20th May 1915 decreeing the plaintiff's suit. The defendants appealed:

*Held:* that in the absence of an order of transfer by a competent authority the Judge had no power to transfer the case to his own file and

deal with it and that his decision was without jurisdiction. [P 269 C 2]

*Per Abdul Raoof, J.*—A judgment and decree passed by the trial Judge after his transfer from the district cannot be said to be ultra vires. [P 269 C 1]

*Per Cheris, J.*—The validity of a judgment written after the Judge has ceased to exercise jurisdiction in respect of the case is doubtful. O. 20, R. 2, merely provides for the pronouncing of a valid judgment which the writer has been unable to deliver himself. [P 269 C 2, P 270 C 1]

*Muhammad Shafi and Muhammad Rafi*—for Appellants.

*Moti Sagar*—for Respondents.

**Abdul Raoof, J.** (14th January 1919).

—This appeal has arisen out of a suit for redemption of a mortgage. The mortgage was made on 26th September 1890 by one Kushi Ram, grandfather of the plaintiffs, in favour of Lala Devi Das, husband of defendant 1, and Bamba Ram, father of defendants 2 and 3. The property mortgaged consisted of Ram Kalli-wala well comprising 1053 kanals and 18 marlas of land, the entire Baghwala well comprising 1048 kanals and 19 marlas of land and Chak 6 ghair taluk comprising 199 kanals and 9 marlas of land. It appears that there were some additions and improvements made to the original mortgaged property. Therefore the property now in dispute is stated to be: (1) Ram Kalli-wala well, (2) Devi Daswala well, (3) Baghwala well, (4) Bambawala doh-arta, and Asanandwala well. It is stated in the plaint that in the place of the original property the property now mortgaged is one which is shown in the heading of the petition of plaint. The amount of the mortgage money was Rs. 4,000. The conditions of the mortgage are stated in the mortgage deed which is printed at p. 2-A of the paper-book and are these: The mortgagees were to remain in possession of the mortgaged property. The income of the property was to be appropriated by the mortgagees for the interest on Rs. 1,000 out of Rs. 4,000. The interest on the remaining sum of Rs. 3,000 was to be at the rate of Rs. 1-8-0 per cent per mensem which was to be paid at the time of redemption. The mortgagor was to be liable for the expenses in connexion with chakdari construction of the enclosure of the new wells, repairs to the existing wells, digging of kassi paggu and the construction of new houses. The mortgagees were to incur the expenses in the first instance and would be entitled to recover the amount so expended with



interest at Re. 1-8-0 at the time of redemption. The mortgage was for 20 years and it was provided that on the expiry of the period the property would be redeemed on payment of the amount due under the mortgage; otherwise the property would be treated as absolutely sold to the mortgagees and would become their property. The original mortgagor Kushi Ram is dead and the plaintiffs to the suit are his grandsons, who are his representatives. The defendants to the suit are the representatives of the original mortgagee. It is stated in the plaint that the period of mortgage expired on 22nd September 1910, that the mortgage has not been foreclosed, that the defendants are holding the mortgaged property as mortgagees. It is further stated that on 29th April 1911 the plaintiffs gave a notice to the defendants demanding the redemption of their property, that on 10th June 1911 the defendants sent a reply to the notice and in it they stated that the property had been sold to them and that they were not mortgagees and the property was not liable to redemption. The plaintiffs therefore claimed that a decree for possession by redemption of the property mentioned in the heading of the petition of plaint may be passed in their favour, on payment of such sum as the Court may find to be due from them. This plaint was filed on 10th April 1913, and was registered on 16th April 1913 and 8th May 1913 was fixed for the settlement of issues.

On 8th May 1913 the pleader for the defendants asked for time for filing the jawab-i-dawa. Time was granted by the Court and the case was adjourned to 17th May 1913. On 17th May 1913 the jawab-i-dawa was filed on behalf of the defendants through their pleader, Moti Ram. The defendants admitted the terms of the mortgage as stated in the plaint and they also admitted their possession of the land in dispute from 26th September 1890, i. e., the date on which the mortgage-deed was executed. They however stated that the transaction was really a sale and not a mortgage and that the document, dated 26th September 1890, was a sale-deed and was executed in the form of a mortgage to avoid a possible claim of pre-emptors. They admitted the correctness of the sum of Rs. 4,000, but they stated that the amount

represented the sale consideration and not mortgage money. The greater portion of the jawab-i-dawa was devoted to the plea of complete sale in favour of the defendants. In para. 10 of the jawab-i-dawa the defendants put forward an alternative defence, in which they stated that even if the transaction was to be considered to be one of a mortgage the defendants were entitled to an amount of Rs. 40,944-7-0, under the conditions of the mortgage. They claimed Rs. 4,000 as the principal mortgage money, Rs. 12,215 as interest on Rs. 3,000 at the rate of Re. 1-8-0 per cent per mensem from 26th September 1900. They further claimed an amount of Rs. 6,379-7-0 on account of expenses which they had incurred. They also claimed Rs. 18,350 as interest due on the above amount of Rs. 6,379-7-0.

The issues framed by the Court on 17th May 1913 are printed at p. 173 of the paper book. Issues 1 and 2 related to the question whether the document of 26th September 1890 represented a transaction of sale or of a mortgage. Issue No. 3 related to the question whether the defendants made any improvements and how much money had been spent by them on those improvements. Issue 4 related to the question whether the defendants were entitled to get the costs of improvements and interest thereon. Issue 5 raised the question of amount which the defendants were entitled to claim from the plaintiffs under the document.

The questions as to the nature of the improvements and the expenses incurred in connexion therewith and the right of the defendants to claim the costs arose in consequence of a statement made by the pleader of the plaintiffs before the issues were framed. An additional issue was framed on 26th May 1913 to the effect whether the statement contained in para. 8 of the defendants' written statement was true and whether the plaintiffs or their grandfather Khushi Ram had committed the acts mentioned therein. The parties were satisfied with these issues and chose to go to trial upon them. Evidence was given on behalf of both the parties and the case was closed on 27th February 1914. A statement made by Lala Perma Nand, pleader for the plaintiffs, on 27th February 1914 is printed at p. 197 of the paper-book and is to the effect that:



"the pleader for the plaintiff states as under: The evidence is closed."

Below this is given the date 27th February 1914, and the initials of Lala Damodar Das, the District Judge, are appended. On the same date Mr. Damodar Das made the following order:

"The arguments have been heard. The case to come up for decision on 16th March." On 16th March Mr. Damodar Das recorded the order that the judgment would be announced on 23rd March. On 23rd March the judgment was not delivered and there is an order on the vernacular record on that date adjourning the case to 31st March 1914 and this order bears the initials of Sadullah Khan. On 31st March 1914 we find a very curious state of things. As I have stated above the evidence in the case had been completed, arguments had been heard and the case was fixed from time to time for delivery of judgment. But on this date we find a statement by Lala Parma Nand, the pleader for the plaintiffs, which is printed at p. 199 of the paper book in which he puts forward quite a new claim and a new plea. I am astonished how the Court allowed the plaintiffs at that stage to put forward a new case. The learned pleader stated that

"Issue 4 was whether the defendants were entitled to costs of improvements and interest thereon. I did not consider it necessary then to give reasons for challenging the costs of improvements and interest thereon leaving it for further inquiry. The plaintiff has by mutual agreement agreed to pay Rs. 4,000 as cost of improvements and incidentally also to the interest on that sum as agreed upon in the mortgage deed, but he did not give up his right to claim a set-off for the extra produce which defendant realized on account of the improvements. The condition as to the produce of land covering interest on Rs. 1,000 out of the principal was intended to apply to the produce which the land was then yielding without improvements and it is for defendant to prove that the extra produce which is due to the improvement is also his right notwithstanding the absence of any express conditions in the deed about this."

The learned pleader after stating the case on behalf of the plaintiffs said that the plaintiffs asked that on account of the extra produce due to the improvements be taken and whatever should be found due to them should be set off with interest against the claim of the defendants. He argued that the document being silent the Court must decide the matter according to justice, equity and good conscience. To this Moti Ram Lala the learned pleader for the defendants,

took objection and contended that it was not open to the plaintiffs' pleader to put forward a new claim. He stated that it was agreed between the parties that the whole produce of the land accruing for 20 years would go towards the interest of Rs. 1,000. The learned Judge however recorded an order which is printed at p. 200 of the paper book, in which he held that under S. 153, Civil P. C., he had ample power to correct any defect or error in any proceedings in a Court and to allow all necessary amendments for determining the real question in issue. He accordingly allowed the plaintiffs to amend the plaint and framed the following additional issues:

"(1) Was condition No. 2 in the mortgage deed intended to mean that defendants mortgagees will be entitled to appropriate the extra produce over and above what was the produce without improvements then stipulated to cover the interest on Rs. 1,000 out of the principal amount towards the interest on Rs. 1,000 only; (2) if not what was the value of extra produce due to improvements together with interest which plaintiffs may be entitled to as a set off against the mortgage debt; and (3) are the terms of the mortgage silent as to how the extra produce due to improvements will be appropriated and therefore what is the reasonable construction of the mortgage deed with reference to considerations of equity justice and good conscience."

It appears that on 11th May 1914, Rai Damodar Das fixed 1st June 1914 as the date for taking further evidence with regard to the new issues which he had framed. On the date fixed, i. e., 1st June 1914, I find an order on the vernacular record which is translated and printed at p. 206 of the paper-book in these words:

"Thakar Bhana Ram for the plaintiff and Sardar Teja Singh and Lala Moti Ram for defendants 1 to 8 are present. Defendant 2 is present in person. The case to come off on 29th June 1914. Rai Damodar Das, Additional District Judge, is on leave."

From this order and the subsequent proceedings it would appear that Rai Damodar Das had ceased to have anything to do with the case and it had been taken up by his successor Mr. Saadullah Khan. All the proceedings commencing from p. 206 and ending at page 215 were taken before Mr. Saadullah Khan. At p. 216 I find a curious order to this effect:

"By an order passed to-day the Senior Subordinate Judge has transferred this case to his own Court. It is therefore ordered that the record of the case be sent to him. The parties are informed to present themselves in that Court to-day."



This order is dated 4th January 1915 and is signed by Saadullah Khan. On the same date I find an order made by Rai Damodar Das in which he says:

"This case is received to-day on transfer. The pleaders for the parties are present. They ask for time for arguments. The case to come off for hearing on 8th January 1915. The arguments will be heard on the date."

Evidently by a mutual arrangement between Saadullah Khan and Rai Damodar Das the case was taken over by Rai Damodar Das. We have examined the record of the case minutely, but have not been able to discover any order of transfer made by a competent authority. The learned advocate for the respondents was asked to show anything upon the record justifying Rai Damodar Das to deal with the case. He was unable to show any order by any competent Court justifying the transfer of the file to the Court of Rai Damodar Das. On 8th January 1915 however the arguments were heard and the judgments was reserved. Before he had delivered his judgment Rai Damodar Das was transferred from the district to Lahore. He however decided the case and wrote his judgment, which is dated Multan, the 20th May 1915. By his judgment he decreed the suit of the plaintiffs. He held that the transaction of 26th September 1890 was a mortgage and that the case set up by the defendants was false. With regard to issues 3 and 4 he held that the parties had come to an agreement that Rupees 4,000 be taken to be the costs of the improvements and that the defendants were entitled to get that sum together with interest as provided in the mortgage deed.

On issue 6 which related to the question of the extra income due to the improvements he held that the plaintiffs were entitled to it and had a right to claim it as a set-off against the mortgagees. According to him the correct interpretation of the clause relating to the interest of Rs. 1,000 was that the mortgagors would be entitled to any extra profits accruing on account of the improvements made by the mortgagees under the terms of the mortgage deed. As regards interest the learned Judge held that it would be just and equitable not to allow interest to the plaintiffs on the amount of income found due to them in consequence of the improvements and that no interest should be allowed to the

mortgagees on the amount of costs of the improvements which had been assessed at the sum of Rs. 4,000 by mutual agreement between the parties. At the end of his judgment he has set out the account between the parties and has held that the plaintiffs are entitled to a decree for redemption on the payment of the sum of Rs. 7,115 to the mortgagees. He accordingly passed a preliminary decree for redemption in favour of the plaintiffs on 20th May 1915 ordering that plaintiff would also recover costs from the defendants. On 19th July he passed a final decree in favour of the plaintiffs which is the subject of the connected appeal. The defendants-mortgagees have come up in appeal to this Court against both these decrees. The present appeal No. 1657 of 1915 is against the preliminary decree. Five pleas have been taken in the memorandum of appeal against this decree.

In the first place it has been argued on behalf of the defendants that the Additional Judge, having been transferred to Lahore on special appointment, had no jurisdiction to deal with the case after such transfer and the judgment and decree were therefore passed without jurisdiction and were ultra vires. It was contended that the transfer of the learned Judge from Multan deprived him of the jurisdiction to deal with the case and write the judgment and pass a decree. On behalf of the respondents it was argued that O. 20, R. 2. Civil P. C., entitled the learned Judge to write his judgment even after he had been transferred from the district. In support of this argument the learned counsel for the respondents relied upon the Full Bench ruling in *Satyendra Nath Ray Chaudhari v. Kastura Kumari Ghotwalin* (1). The facts of that case are very similar to the facts of the present case. In that case the suit was instituted before and tried by Mr. Thompson when he was the Subordinate Judge of Deogarh but by an order of the Local Government dated 31st December 1904, Mr. Thompson was transferred to Damka and ceased to be the Subordinate Judge of Deogarh on 17th January 1905. He recorded his judgment in the case on 21st November 1905, i. e., after the lapse of ten months. He wrote his judgment and sent it to the then Subordinate Judge of Deogarh and

(1) [1908] 35 Cal. 756 (F. B.).



asked him to deliver the judgment. Upon an appeal a Division Bench of the Calcutta High Court was of opinion that the learned Subordinate Judge had no jurisdiction to deliver a judgment in the case after his transfer; but as there was a Division Bench ruling of that Court reported as *Sunder Kuar v. Chandreshwar Prasad Narain Singh* (2) which was opposed to their view, the learned Judges referred the case to a Full Bench.

The Full Bench had no difficulty on the construction of S. 199, Civil P. C., which corresponds to O. 20, R. 2, of the present Code, in holding that the course adopted by the learned Subordinate Judge was permitted by that section. The learned Judges held that there was nothing in S. 199 which indicated directly or indirectly that the judgment of the Judge who if leaving the Court must be written by him before he has left. Upon a review of authorities they held that the judgment and decree passed in that case were not ultra vires. This ruling was followed by the Allahabad High Court in the case of *Basant Bihari v. Secy. of State* (3). The High Court of Bombay also held a similar view in the case of *Girjashankar v. Gopalji* (4). In a case *Daya Ram v. Mt. Jatti* (5) a similar view was taken by Sir D. Johnstone, the then Chief Judge of this Court. He relied upon the provisions of O. 20, R. 2, Civil P. C. and adopted the interpretation put upon it in the cases reported as *Girjashankar v. Gopalji* (4) and *Sunder Kuar v. Chandreshwar Prasad Narain Singh* (2). Although the particular circumstances of that case were somewhat different from those of the present case, there is no doubt that the principle underlying the decision of the learned Chief Judge was the same as laid down in the cases above referred to. There appears to be almost a general consensus of opinion upon the point in the High Courts above mentioned and in my opinion the judgment and decree of the lower Court cannot be said to be ultra vires on this ground. It is however further contended by the learned counsel for the appellants that Mr. Saadullah Khan, the learned Subordinate Judge of Multan, being seised of the

case, Rai Damodar Das had no power under the law to transfer it to his own file and decide it. In my opinion there is force in this argument and in the absence of any lawful transfer of the case to Rai Damodar Das, I must hold that he had no jurisdiction to decide the case and pass a decree.

In reply to this argument the learned counsel for the respondents has argued that although no order of transfer by a competent authority is to be found on the record, it ought to be presumed according to the maxim *omnia praesumuntur rite et solenniter esse acta* that the proceedings in a Court must have been taken according to law and that we must presume in this case that there was a legal transfer of the case to the Court of Rai Damodar Das and the decree was legally passed. It has however not been contended by him nor can it validly be contended that such a presumption is not rebuttable. In the present case the circumstances do not justify such a presumption. The very words of the two orders of 4th January 1915, one signed by Mr. Saadullah Khan and the other by Rai Damodar Das to which I have already referred, leave no room for making such a presumption. In my opinion had there been any legal order for transfer it would not have been difficult to trace it on the record. It appears that Rai Damodar Das himself transferred the case to his file and dealt with it. In my opinion he had no power to do so and his decision was without jurisdiction. In this view it is not necessary to decide the remaining pleas taken in the memorandum of appeal. It may however be mentioned that the pleas which the defendants raised in the Court below as to the document of 26th September 1890 being a sale-deed was expressly abandoned in this Court. I therefore propose that the appeal should be allowed, the judgment and decree of the lower Court should be set aside and the case be remanded under O. 41, R. 23, to the Court of the Subordinate Judge of Multan to be reinstated on its original number and to be decided according to law. Costs will abide the result.

**Chevis J.**—(20th January 1919)—I agree, except that I wish to express grave doubts as to the validity of a judgment written after an officer has ceased to exercise jurisdiction. I recognize that

(2) [1907] 34 Cal. 293.

(3) [1913] 35 All. 368=19 I. O. 785.

(4) [1906] 30 Bom. 241.

(5) [1916] 80 P. R. 1916=35 I. O. 938.



there is a good deal of authority for the opposite view, but with all due respect I fail to see that O. 20, R. 2, covers the case. That rule seems to me merely to provide for the pronouncing of a valid judgment which the writer has been unable to deliver himself. If a Judge, on transfer, took away notes of arguments and later on wrote a judgment and sent it to his successor to pronounce, what would happen if his successor, ignorant of what the first Judge was doing, had in the meantime called the parties, heard arguments and written and pronounced judgment himself? Which judgment would prevail? Would both of the Judges have jurisdiction to write a judgment? In all other respects I agree with my learned brother. It will be for the first Court to decide what effect should be given to the amendment of plaint.

**Abdul Raoof, J.**—The order is that the appeal is accepted, the judgment and decree of the first Court and all proceedings on and after 4th January 1915 are set aside, and the case is remanded for re-decision in due course. Stamp on appeal to this Court to be refunded, other costs in this Court to be costs in the cause.

R.M./R.K. *Appeal accepted.*

### A. I. R. 1919 Lahore 270

LEROSSIGNOL AND WILBERFORCE, JJ.

*Mahnu*—Plaintiff—Appellant.

v.

*Shihan Singh and others* — Defendants—Respondents.

Second Appeal No. 716 of 1915, Decided on 19th December 1918, from decree of Addl. District Judge, Amritsar, D/- 14th December 1914.

**Limitation Act (9 of 1908), Art. 144 — Possession of trespasser is adverse to collaterals.**

*R.*, prior to 1865, adopted *M.*, who predeceased him leaving an adopted son *J.* On *R.*'s death *J.* succeeded to the estate and a suit by certain collaterals of *R.* against him for possession was dismissed. On *J.*'s death his two sons succeeded. The plaintiff, another collateral of *R.*'s, brought the present suit for possession of *R.*'s lands, but his suit was dismissed as barred by limitation. On appeal:

**Held:** that even if *J.* was not the rightful heir of *R.* and his possession was that of a trespasser, it was nevertheless adverse to all the collaterals among whom was the plaintiff's father, and as plaintiff derived his title through his father, *J.*'s possession was adverse to him and his suit was barred by limitation. [P271 C1]

*Badru-ud - Din Kureshi* — for Appellant.

*Fazl-i-Hussain* — for Respondents.

**Judgment.**—Plaintiff in this case is a collateral of one Ratna, who before 1865 adopted his sister's son Mehar Singh. Mehar Singh however predeceased Ratna, and on Ratna's death, which occurred more than forty years ago, Mehar Singh's son Jhanda Singh succeeded to the estate. Jhanda Singh died about a year before the present suit and was succeeded by his two sons. In this suit plaintiff claims possession of Ratna's land, but the suit has been dismissed on the ground that it is barred by limitation. In 1870 two of Ratna's collaterals, who were not however ancestors of the plaintiff, sued Jhanda Singh for possession of the land, but the suit was dismissed, the Courts deciding that Jhanda Singh by reason of his and his father's services to Ratna was entitled to possession of the land, and the Court quite unnecessarily made a suggestion that the collaterals could sue on the death of Jhanda Singh. This suggestion was quite uncalled for and was based probably on the circumstance that at that time Jhanda Singh had no male issue.

The learned Additional Divisional Judge holds that the suit is time barred under Art. 144, Lim. Act., and before us it is urged that the decision of the Court below is in conflict with the principles of *Sundar v. Salig Ram* (1), and that the Court below has wrongly distinguished that case from the present. Reference has been made by learned counsel to certain judgments of this Court in which it was held that though a person governed by Customary law derived his right to possession through his father he did not so derive his right to sue for that possession through him. On the other hand, there are judgments of this Court that the result of litigation bona fide sustained by such a person's father or ancestor is binding upon that person. Now this Court in the litigation of 1870 held that Mehar Singh had been rightly adopted by Ratna, and there can be no doubt as to the bona fides of that litigation. If then the decree obtained by one of the collaterals enures for the benefit of other collaterals, it is hard to see why a decree obtained against a collateral should not affect all other collaterals similarly in-

(1) [1911] 26 P. R. 1911=9 I. C. 300.



terested. However that may be Jhanda Singh has been in possession since the death of Ratna which took place over forty years ago. If Mehar Singh was adopted by Ratna his descendants are entitled to possession. If he was not adopted by Ratna, Jhanda Singh since the death of Ratna, has been in possession as a trespasser. His possession was adverse to all the collaterals, included among whom was the plaintiff's father, and we hold that as plaintiff derived his title through his father, Jhanda Singh's possession has been adverse to him, and the suit was rightly dismissed as barred by limitation. We dismiss the appeal with costs.

R.M./R.K.

*Appeal dismissed.***A. I. R. 1919 Lahore 271**

CHEVIS, J.

*Mangal Singh and another*—Plaintiffs—Appellants.

v.

*Mt. Shankari and another*—Defendants—Respondents.

Second Appeal No. 2090 of 1918, Decided on 8th February 1919, from decree of Dist.-Judge, Jullundur, D/- 13th May 1918.

(a) Limitation Act (1918). Art. 123 — Art. 123 does not apply to suit by one heir against coheir.

Article 123 only applies to suits against a defendant who is legally bound to distribute the estate, for instance, an executor or administrator, and not to a suit by one heir against a co-heir. 84 *Mad.* 511; *A. I. R.* 1915 *All.* 12 and *A. I. R.* 1915 *All.* 253, *Foll.* [P 271 C 2]

(b) Limitation Act (1908), Art. 144—*N's* house held by his widow—After her death, *N's* brother *G* continuing in possession—More than 12 years after widow's death other brother of *N* suing for his share—Art. 144 governed case—*G's* possession must be presumed to be on behalf of all co-owners—*G* must prove adverse possession.

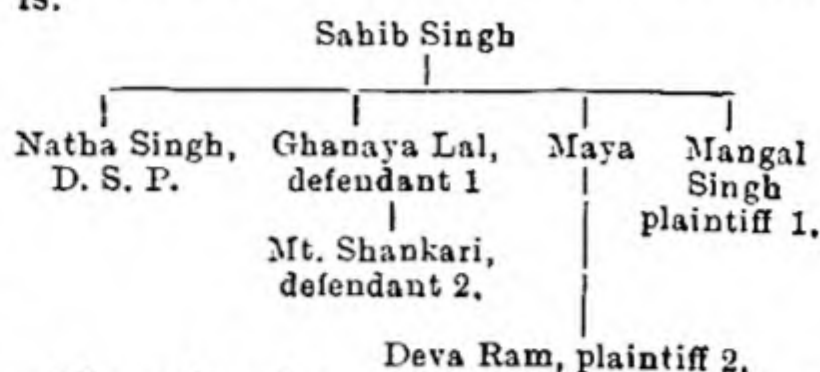
One *N*, bought a house and on his death it was held by his widow. She died over 12 years prior to the suit and it was found that ever since her death *N's* brother *G* had remained in sole possession of the house. *G* made a gift of the house in favour of his daughter, and his brother and another brother's son sued for possession of 2/3rds of the house and claimed a declaration with respect to the other 1/3rd that the gift shall not affect their reversionary rights:

*Held*: (1) that the suit was governed by Art. 144, (2) that as *G* was already living in the house in suit when *N's* widow died the presumption was that he stayed on on behalf of all the co-owners; (3) that the onus was on the defendants to prove that their possession had been adverse for 12 years prior to suit; (4) that they having failed to discharge the onus the plaintiffs were entitled to get their share. [P 271 C 2; P 272 C 1]

*Jagan Nath*—for Appellants.

*Dharm Das Suri*—for Respondents.

**Judgment.**—The genealogical tree is:



The suit relates to a house which was bought by Natha Singh and on his death was held by his widow. She died over 12 years prior to suit. Ghanaya Lal has apparently been in sole possession ever since; in fact it is said that he took up his residence in the house even in the lifetime of Natha Singh's widow, and it would not be strange if he did so, seeing that his own wife and Natha Singh's widow were (as the learned pleaders tell me) sisters. Lately Ghanaya had made a gift in favour of his daughter. Plaintiffs sue for possession of 2/3rds and claim a declaration for the other 1/3rd. The first Court gave a decree for possession of 2/3rds, dismissing the suit for a declaration. Both sides appealed to the District Judge, who dismissed the suit as barred by limitation under Art. 123. This Article however only applies to suits against a defendant who is legally bound to distribute the estate, e. g., an executor or administrator, and not to a suit by one heir against a co-heir: see *Khadersa Hajee Bappu v. Puthen Veetil Ayissa Ummah* (1) and *Amina Bibi v. Najmunnissa Bibi* (2) and *Abdul Gaffar v. Nurjahan Begum* (3). Art. 144 is the Article applicable in my opinion to the present suit. On the death of Natha Singh's widow Ghanaya and the two plaintiffs jointly succeeded. (Ghanaya has failed entirely to prove his allegation of a gift in his favour from Natha Singh.) Ghanaya was already living in the house when Natha Singh's widow died, and the ordinary presumption in such a case is that he stayed on on behalf of all the co-owners. It is for him to prove adverse possession. He made some repairs, and later on re-built the house making it pakka.

(1) [1911] 34 *Mad.* 511; 6 *I. C.* 50.

(2) *A. I. R.* 1915 *All.* 12=37 *All.* 233=27 *I. C.* 712.

(3) *A. I. R.* 1915 *All.* 253=37 *All.* 434=29 *I. C.* 847.



He is certainly now in adverse possession (or was when the suit was brought—he has since died), but it is for defendants to prove that his possession has been adverse for 12 years prior to suit. I can find no proof of this. The building and making the house pakka is within 12 years of suit. The previous kacha repairs are such as any occupant might well carry out without asserting any title. For defendants it is now urged that plaintiffs have lost their title by acquiescence, but this is entirely a new plea. The claim for a declaration is not pressed in this Court. I consider plaintiffs have a right to their own share, and I accept this appeal and restore the decree of the first Court for possession of 2/3rds. But as plaintiffs seem to have been very leisurely in bringing their claim, I leave the parties to bear their own costs in all Courts.

R.M./R.K. *Appeal accepted.*

### A. I. R. 1919 Lahore 272

SHADI LAL, J.

*Mul Chand-Sanwal Das*—Plaintiff—Petitioner.

v.

*B. B. and C. I. Ry. Co. and others*—Defendants—Opposite Party.

Civil Revn. Petn. No. 371 of 1918, Decided on 16th January 1919, from order of Dist. Judge, Ferozepore, D/- 14th March 1918.

Civil P. C. (1908), S. 20—Suit for breach of contract can be either at place of breach or of contract.

An action for damages for breach of a contract can, at the option of the plaintiff, be brought either in the place where the breach was committed or in the place where the contract was made. [P 272 C 2]

Plaintiff consigned some goods from Muktsar Railway Station (B. B. and C. I. Railway) to Howrah (E. I. Railway) and endorsed the railway receipt in favour of defendant 3. Subsequently he asked the Station Master of Muktsar to telegraph to Howrah that delivery should not be made to defendant 3 but to the plaintiff himself. Delivery not having been made in accordance with this direction, plaintiff instituted a suit for damages in the Ferozepore Court which exercises jurisdiction over Muktsar:

*Held:* that the contract for the carriage of the goods having been admittedly entered into at Muktsar, the suit was cognizable by the Ferozepore Court. [P 272 C 2]

*Tek Chand*—for Petitioner.

*Sohan Lal* for Bansi Dhar and Durga Dutt, Shiv Narain and Manohar Lal—  
for Opposite Party.

**Judgment.**—The facts of this case as set out in the plaint are briefly as follows: The plaintiff consigned some goods from Muktsar Railway Station (B. B. and C. I. Railway) to Howrah on the E. I. Railway. The railway receipt was made out in plaintiff's name, but it was endorsed by him in favour of defendant 3. The plaintiff subsequently asked the Station Master of Muktsar to telegraph to Howrah that delivery should not be made to defendant 3, but to the plaintiff himself; but it seems that the delivery was not made in accordance with this direction. The plaintiff has now instituted a suit in the Ferozepore Court, which exercises jurisdiction over Muktsar, against the two Railway Administrations and defendants 3 to 5 for damages sustained by him on account of the wrongful delivery of the goods. The Courts below, holding that the Ferozepore Court had no jurisdiction to entertain the claim, have returned the plaint for presentation to the proper Court. Now it seems to me that this claim arises out of the contract entered into between the plaintiff and the B. B. and C. I. Railway. There was only one contract for the carriage of the goods for the whole of the distance from Muktsar to Howrah: vide *Chunni Lal v. The Nizam's Guaranteed State Railway Co.* (1) and that contract was admittedly entered into at Muktsar. The plaintiff's contention in essence is that the undertaking to deliver the goods to him or his nominee has not been carried out, and that consequently there has been a breach of the contract which has caused him loss. This cause of action may or may not be established, but I consider that the suit as laid is cognizable by the Ferozepore Court.

It is a well-established principle that an action for damages for the breach of a contract can, at the option of the plaintiff, be brought either in the place where the breach was committed or in the place where the contract was made. S. 20, Civil P. C. 1908, merely sums up the rule enunciated in S. 17 of the old Civil P. C. and there can be no manner of doubt that in accordance with the provisions of the latter section a Court, within whose territorial limits a contract was made, could take cognizance of a suit based upon the breach of that contract. The judg-

(1) [1907] 29 All. 228.



ment in *Deokee Nundun v. Oomrao Singh* (2) relied upon by Mr. Manohar Lal proceeds upon a different set of facts and has no bearing upon the point before me. There the plaintiff consigned goods from Meerut to the defendant at Cawnpore with the instruction to sell them there. The defendant received the goods, but contrary to the orders for sale at Cawnpore sent some of them to Calcutta for sale. It was held that the plaintiff's cause of action arose, not at Meerut, but at Cawnpore; and that the suit could not be entertained by the Meerut Court. I hold that a part of the cause of action arose within the territorial limits of the Ferozepore Court, and that the Court of first instance had jurisdiction to entertain the suit. Accordingly I accept the application for revision and setting aside the orders of the lower Courts remit the case for decision on the merits. Cost of this application shall be costs in the cause.

R.M./R.K.

*Petition accepted.*

(2) [1867] 2 Agra. H. C. R. 248.

### A. I. R. 1919 Lahore 273

SCOTT-SMITH AND MARTINEAU, JJ.

*Ram Dyal*—Defendant—Appellant.

v.

*Mohammad Raju Shah and others*—Plaintiffs—Respondents.

Second Appeal No. 1225 of 1915, Decided on 22nd July 1918, from decree of Dist. Judge, Multan, D/- 15th March 1915.

Civil P. C. (1908), O. 1, R. 8—Permission once obtained under R. 8 in suit is good for appeal also.

Once the permission of the Court is obtained to the bringing of a suit in a representative capacity under O. 1, R. 8, Civil P. C., there is no necessity to get any further permission in the Court of appeal. [P 274 C 2]

*Hargopal and Jagan Nath*—for Appellant.*Sleem*—for Respondents.

### Order

**Scott-Smith, J.**—(23rd April 1918)  
—The case out of which this appeal arises was decided by Mirza Zafar Ali, Additional District Judge, on 20th January 1912 and the appeal from his order was decided by Sheikh Amir Ali, District Judge, on 15th March 1915. A second appeal by the defendant was admitted for hearing before a single Judge apparently on the ground of

1919 L/35 &amp; 36

jurisdiction. The value of the suit is Rs. 3,500 and in ordinary course the appeal should have been admitted to a Division Bench, but counsel for the parties do not object to my disposing of it, if it is disposed of merely on the ground that the lower appellate Court had no jurisdiction to hear the appeal from Mirza Zafar Ali's order. The question whether Sheikh Amir Ali had jurisdiction to hear the appeal is not quite free from difficulty. *Nirinjan Das v. Kirori Mal* (1) is not quite in point, because Mirza Zafar Ali was not gazetted as a Subordinate Judge at all. He was District Judge of Multan, and on 15th November 1911 was relieved of the office by Mr. A. H. Parker, who was appointed in his place, Mirza Zafar Ali on the same date being gazetted as Additional District Judge, see Punjab Government Notifications Nos. 1293.B and 1293.C., of that date. If it be decided that Sheikh Amir Ali had jurisdiction to hear the appeal, then the second appeal should be decided by a Division Bench: see *Mt. Nekhan v. Muhammad Khan* (2), as to the powers of an Additional District Judge under S. 75 of the old Courts Act. There is also another question which should, in my opinion, be decided by a Division Bench, viz., whether the appeal to this Court has abated by reason of the deaths of Muzaffar Ali Shah and Zulfikar Shah, and the failure of appellant to apply for their legal representatives to be brought on the record within the prescribed period of six months.

The suit was brought by Makhdum Shah Muhammad, plaintiff as representing all those entitled to sue under O. 1, R. 8, Civil P. C., and the question is whether, when any of those for whom he is suing dies, it is necessary to make an application under O. 22, R. 4, Civil P. C. No ruling applicable to the case is cited, but *Ponniathakathoot Parameswarem Munpu v. Moothedath Mallseri Illath Narayan Namboodri* (3) may be referred to. The appeal is accordingly transferred to the Division Bench. A very early date should be fixed as it has been pending for nearly three years already. Appellant should, if so advised, take steps to get those respondents served who have not yet been served.

(1) [1917] 38 P. R. 1917=41 I. O. 42.

(2) [1898] 46 P. R. 1898.

(3) [1917] 40 Mad. 110=34 I. O. 384.



**Judgment of the Division Bench.**

**Scott-Smith, J.**—(22nd July 1918)  
—This appeal has been referred to the Division Bench for the decision of two points as set forth in the referring order of 23rd April 1918. The first question is whether Sheikh Amir Ali, District Judge, Multan, had jurisdiction to hear the appeal from the order of Mirza Zafar Ali, Additional District Judge, dated 20th January 1912. The appeal was no doubt duly filed in the Court of the Divisional Judge, Multan, who at that time had jurisdiction to hear appeals from orders of the District Judge and the Additional District Judge, but under the new scheme which came into force on 1st August 1914 the Court of the Divisional Judge ceased to exist and its place was taken by that of the District Judge. Now it is admitted that had Mirza Zafar Ali been the District Judge when he decided the suit, the appeal from his order could not have been heard by Sheikh Amir Ali, District Judge. But counsel for the respondent relies upon *Nirinjan Das v. Kirori Mal* (1), in which it was held that where a Subordinate Judge who has been appointed Additional Judge hears and decides a case which has not been assigned to him by the District Judge under S. 21 (2), Punjab Courts Act, the appeal from his decision lies to the District Judge if the value of the suit does not exceed Rs. 5,000, and not to the Chief Court. This authority is not on all fours with the present case, because here the suit was not decided by a Subordinate Judge who had been appointed Additional Judge or Additional District Judge under the former Courts Act. Mirza Zafar Ali was District Judge, Multan, and on 16th November 1911 was relieved by Mr. A. H. Parker who was appointed in his place. On the same date Mirza Zafar Ali was gazetted as Additional District Judge.

As pointed out in the referring order, he was never at any time gazetted as a Subordinate Judge of Multan. In the case reported as *Shib Nath v. Alliance Bank of Simla Ltd.* (4), it was held that the transfer of a case by the District Judge to the Additional District Judge was an assignment of the case by the former to the latter. In any case, as

(4) A.I.R. 1914 Lah. 187=3 P. R. 1915=25 I. O. 480.

Mirza Zafar Ali did not combine in himself the functions both of a Subordinate Judge and Additional District Judge, but was only an Additional District Judge, we must hold that the suit was decided by him as Additional District Judge and therefore the appeal clearly did not lie to the District Judge, but to the Chief Court. We therefore hold that the District Judge's order appealed from was passed without jurisdiction and must be set aside. The second question referred is whether the appeal to this Court has abated by reason of the deaths of Muzaffar Ali Shah and Zulfikar Shah and the failure of the appellant to apply within the statutory period to have their legal representatives brought on to the record. The suit was brought by Sheikh Mohammad Raju for himself and 29 others under O. 1, R. 8, Civil P. C. These 29 included Muzaffar Ali Shah and Zulfikar Shah, but they never applied to the Court to be made parties to the suit under O. 1, R. 8, sub-Cl. (2), Civil P. C.

They therefore were never parties to the suit and there was no necessity for them to be made respondents in the appeal to this Court. It is contended by Mr. Sleem on behalf of the respondent that though permission of the Court was obtained in the trial Court under O. 1, R. 8, it was necessary to again obtain the permission of the Court for the appeal. He cites no authority in support of this contention and it has, in our opinion, no force. Once the permission of the Court has been obtained to the bringing of a suit in a representative capacity under O. 1, R. 8, there is no necessity to get any further permission in the Court of appeal. We therefore hold that the appeal has not abated by reason of the fact that legal representatives of the two persons named were not brought on to the record within the statutory period. We accept the appeal and set aside the order of Sheikh Amir Ali as passed without jurisdiction and restore the order of the first Court. By this order plaintiff's suit is dismissed. The memorandum of appeal will be returned to him, and, if so advised, he can file it again in this Court. We further direct that the plaintiff-respondent shall pay defendant's costs throughout, provided that if he files his appeal again in this Court and it is admitted to



a hearing, the costs of this Court will then follow the event.

R.M./R.K. *Appeal accepted.*

### A. I. R. 1919 Lahore 275 (1)

RATTIGAN, C. J.

*Muhammad Ali and others*—Defendants—Appellants.

v.

*Amir Khan and another*—Plaintiffs—Respondents.

Second Appeal No. 2083 of 1917, Decided on 27th June 1918, from decree of Dist. Judge, Mianwali, D/- 18th April 1917.

Civil P. C. (1908), S. 100—Construction of deed about what share was conveyed is question of fact.

The question whether a pro rata share of the shamilat was intended to be conveyed to the vendees under a sale-deed which is silent on the subject is a question of fact and no question of the construction of the sale-deed arises in the case. [P 275 C 2]

*Badr-ud-Din Kureshi*—for Appellants.

*Nanak Chand*—for Respondents.

**Judgment**—This appeal is intimately connected with Civil Appeal No. 1850 of 1914, *Sultan Ali v. Malik Amir* (1), which came before a Division Bench for decision on 9th May 1917. The deed of sale in both cases is one and the same and though the vendees are different the question in both cases is whether under the terms of the deed of sale a pro rata share of shamilat was intended to be conveyed to the vendees. In this case, as in the other case the lower Courts have concurred in holding that no shamilat rights were sold. I have heard Mr. Badr-ud-Din for the appellants and Mr. Nanak Chand for the respondents, and I see no reason whatever to differ from that concurrent finding. As a matter of fact, as pointed out by the Division Bench in the other case no question of law really arises in these appeals. The deed of sale is admittedly silent on the subject of shamilat and consequently there is no question here of construing it in order to discover the intention of the parties. In the case before the Division Bench, the learned Judges remanded an issue for trial regarding the allegation made by the defendant in that case that subsequently to the sale Government had granted a large area of land to the village, that this area had been recorded as shamilat deb and that in any case all

(1) 95 [1919] P. R. 1919=51 I. C. 878.

persons, who at the time of the grant were proprietors, were entitled to a share in that area. In the case before me no such allegation was ever made by the defendant, and it is unnecessary for me therefore to set up a new case on his behalf. All that he has ever claimed was that on a proper construction of the sale transaction he was entitled to claim that a proportionate part of the shamilat, as it existed at the date of the sale had been conveyed to him. For the reasons given I hold that this is a matter which cannot be gone into in second appeal and that I see no reason to differ from the concurrent finding of the Courts below as to the intention of the parties to the sale of 1870. I accordingly reject this appeal with costs.

R.M./R.K.

*Appeal rejected.*

### A. I. R. 1919 Lahore 275 (2)

LEROSSIGNOL, J.

*Mohibuddin and others*—Judgment-debtors—Appellants.

v.

*Partab Mal and others*—Decree-holders—Respondents.

Second Appeal No. 1195 of 1918, Decided on 23rd May 1918, from order of Dist. Judge, Karnal, D/- 20th December 1917.

(a) Appeal—Jurisdiction—Execution.

An appeal from an order in execution of a decree for over Rs. 5,000 lies to the High Court and not to the District Judge. [P 276 C 1]

(b) Civil P. C. (5 of 1908), O. 21, R. 53 (3)—Attachment of decree—Powers of executing Court are same as holder of decree attached.

Under the provisions of O. 21, R. 53 (3) of the holder of a decree which is to be executed by attachment of another decree has the same powers of executing that other decree as the holder of that decree. [P 276 C 1]

*Behari Lal and Niaz Ali*—for Appellants.

*Jagan Nath and Manohar Lal*—for Respondents.

**Judgment.**—Juglu and Partab sued Mohammad Yusaf for Rs. 45,897 and secured attachment of some cotton before decree. The cotton was auctioned for Rs. 16,390 odd and Mohammad Yusaf was allowed to withdraw that sum on the security of Mohibuddin and Nawab Mohammad Yusaf. One Nanu Mal obtained a decree for Rs. 2,850 against Juglu and Partab and in execution of his decree attached their decree against Mohammad Yusaf and sought execution



against the sureties. The Senior Subordinate Judge, on account of some formal defect in the surety deeds, discharged the sureties and on appeal to the District Judge by Partab and Juglu, the District Judge has held that the Senior Subordinate Judge's order was ultra vires inasmuch as Nanu Mal had no right to raise the question of the sureties' liability for he could not execute Partab and Juglu's decree before purchasing it.

The learned District Judge's order cannot be upheld, just because the appeal from an order in execution of a decree for Rs. 45,000 odd lay to this Court, secondly because he has overlooked the provisions of O. 21, R. 53 (3), which ordains that holder of a decree which is to be executed by attachment of another decree shall have the same powers of executing that other decree as the holder of that decree. I accept the appeal, set aside the lower appellate Court's order and direct that the appeal be returned for presentment to the proper Court. Costs to follow final event.

R.M./R.K.

*Appeal accepted.***A. I. R. 1919 Lahore 276 (1)**

MARTINEAU, J.

*Nanak and others*—Defendants—Appellants.

v.

*Bhagwan Singh and another*—Plaintiffs—Respondents.

Misc. Second Appeal No. 1010 of 1918, Decided on 6th June 1918, from order of Dist. Judge, Hoshiarpur, D/- 10th January 1918.

(a) Punjab Tenancy Act (1887), S. 4 (6)—Landlord.

The term "landlord" as defined in S. 4 (6) includes a mortgagee in possession. [P 276 C 2]

(b) Punjab Tenancy Act (1887), S. 4 (6)—Pre-emption—Occupancy rights—Sale of, to mortgagee with possession of proprietary rights—Vendor's collateral cannot pre-empt.

Vendor's collaterals sued for possession by pre-emption of certain land sold by an occupancy tenant, to the mortgagees with possession of the proprietary rights;

*Held*: that the plaintiff was not entitled to succeed, inasmuch as the sale must be held to have been made in favour of the landlord: 38 I. C. 712, *Foll.* [P 276 C 2]

*Kunwar Narain*—for Appellants.

*Tek Chand*—for Respondents.

**Judgment.**—Prabhu, defendant 1, an occupancy tenant under S. 6, Tenancy Act, has sold his occupancy rights to defendants 2 to 6, who are mortgagees with possession, of the proprietary rights. The

plaintiff sues for pre-emption on the ground that he is a collateral of the vendor. The first Court dismissed the suit, holding that the mortgagees of the proprietary rights were the landlords, and that in accordance with the ruling of *Akbar Hussain v. Ali Ahmad* (1) the plaintiff had no right of pre-emption as against them. On appeal the lower appellate Court has remanded the case, being of opinion that the term "landlord" in the ruling quoted was used in the sense of "proprietor" and was not meant to include a mortgagee.

The defendants have filed a second appeal in this Court. It has been held in certain cases that the term "landlord" as defined in S. 4 (6), Tenancy Act, includes a mortgagee in possession. The learned District Judge admits this, but thinks that in *Akbar Hussain v. Ali Ahmad* (1), the word should be taken as used in the restricted sense of "proprietor." I do not agree with this view. The case of 1916 decides that there is no right of pre-emption in respect of a sale by an occupancy tenant of his occupancy rights to the landlord, under whatever section of the Act he holds his tenancy. The decision is based on the rights given to the landlord by the provisions of the Tenancy Act, and consequently the word "landlord" in the ruling must have the meaning which it bears in the Act itself and therefore includes a mortgagee in possession. I can see no warrant for the contrary conclusion, and I hold that the ruling of 1916 applies to the present case and the suit must fail. I accept the appeal, set aside the order of the lower appellate Court, and restore that of the first Court dismissing the suit. The plaintiff-respondent will pay the appellant's costs throughout.

R.M./R.K.

*Appeal accepted.*

(1) [1916] 116 P. R. 1916=38 I. C. 712.

**A. I. R. 1919 Lahore 276 (2)**

ABDUL RAOOF, J.

*Ram Saran Das*—Plaintiff—Appellant.

v.

*Nathwa and others*—Defendants—Respondents.

Misc. Second Appeal No. 3050 of 1918, Decided on 31st March 1919, from decree of Dist. Judge, Delhi, D/- 14th August 1918.



Civil P. C. (1908), O. 41, R. 19—Opportunity to prove sufficient cause for absence should be given—Application for restitution should not be summarily dismissed.

An application under O. 41, R. 19, praying for the restoration of an appeal dismissed in default, ought not to be rejected summarily without affording the applicant an opportunity of establishing the allegations made in his application, and without considering whether there was good cause for his absence on the date fixed.

[P 277 C 1, 2]

*Shamair Chand*—for Appellant.

*Manohar Lal*—for Respondents.

**Judgment.**—This is an appeal from an order refusing to set aside an order dismissing an appeal for default of appearance on the part of the appellant. The appeal was fixed for hearing for 14th August 1916. During the early part of the day it was called for hearing when neither appellant nor his counsel was present to prosecute it. The learned Judge of the Court below dismissed it for default of appearance.

On 21st August 1918, an application was made in accordance with R. 19, O. 41, Civil P. C., praying for the restoration of the appeal to its original number. In the application it was stated that the applicant could not appear on account of his illness, that he had sent his mukhtar to look after the case but as he could not find the pleader to attend to the appeal, it was dismissed for default of prosecution. It was further stated that the counsel was actually brought to the Court of the learned District Judge later on, but it was discovered that the appeal had already been disposed of and the record consigned to the record room. The application was summarily rejected by the learned Judge who remarked that as there was no medical certificate filed and as there was no reason why the applicant's counsel should not have been present, sufficient cause had not been shown for the restoration of the appeal. That is not what is contemplated by the law. The learned Judge ought to have taken into consideration the allegations upon which the application was made and ought to have come to the conclusion whether there was good cause for the absence of the applicant on the date fixed. There appears to be no material upon the record upon which it may be possible for this Court to form an opinion. The proper course for the learned Judge would have been to have called upon the applicant to establish the allegation made in

his application. If the appellant was unable to prove by evidence the allegations made in the application, the learned Judge would have been entitled to refuse his application, but there appears to be no indication in his judgment that he gave any opportunity to the applicant to establish the ground set forth in his application. In my opinion an opportunity should be given to the petitioner to show by evidence whether he was unable to appear on the date fixed for the hearing of the appeal.

I set aside the order rejecting the application for restoration and send the case back to the lower appellate Court, in order that the Court may give the appellant an opportunity to produce such evidence as he wishes to produce. If in the opinion of the learned Judge after considering the evidence it is necessary to hear the opposite party, notice maybe issued to him to show cause why the application should not be allowed. Costs will abide the result.

R.M./R.K.

*Case remanded.*

### A. I. R. 1919 Lahore 277

SCOTT-SMITH, J.

*Parman*—Defendant—Appellant.

v.

*Ghanthu*—Plaintiff—Respondent.

Second Appeal No. 1129 of 1917, Decided on 23rd January 1919, from decree of Addl. Judge, Kangra, D/- 10th February 1917.

Punjab Tenancy Act (1887), S. 8—Occupancy right may be decreed if there is promise by landlord never to eject tenant—Promise may be implied—Promise not to eject, means not to eject "ta qasur."

One of the cases in which occupancy rights may be decreed under S. 8 is where there has been a promise by the landlord never to eject the tenant. A promise of this character need not necessarily be explicit. It may be implied, and may be established by evidence of the intention of the parties as shown by their actions.

[P 278 C 2]

A promise not to eject however does not mean a promise not to eject under all circumstances whatsoever, but a promise not to eject "ta qasur" that is, till commission of a fault against the tenure.

[P 278 C 2]

Where certain tenants and their predecessors had occupied certain land as basiku opahus for 100 years and for three full generations and had built houses on the land occupied by them.

*Held:* that under all the circumstances it must be inferred that there was an implied promise on behalf of the owners of the land not to eject the tenants ta qasur.

[P 278 C 2]

*Tek Chand*—for Appellant.

*Fakir Chand*—for Respondent.



**Judgment.**—The facts of the case out of which the present appeal arises are given in the previous order of this Court dated 8th April 1918 *Parman v. Ghanthu* (1). The question whether a civil Court has jurisdiction to try this suit has now been decided in the affirmative by the order of the Division Bench in Civil Miscellaneous No. 241 of 1918 decided on 3rd August 1918 [*Parman v. Lhassu* (2)]. The only question remaining for decision is whether the plaintiffs-respondents in this and in the connected appeal, No. 1428 of 1917, had a right of occupancy under S. 8, Punjab Tenancy Act. The parties belong to the Kangra District and the plaintiffs are what are called basiku opahus or tenants who have been induced to settle down on the land and build themselves a basi or homestead on or near it for the purpose. The full description of this class of tenure is given in paras. 54 et seq. of Lyall's Settlement Report of the Kangra District, 1865-72. Mr. Lyall says in para. 54:

"There is no deed or express verbal agreement, but the implied contract is that the tenant shall hold so long as he farms well and pays his rent; or, in other words, ta qasur, that is, till commission of fault against his tenure."

Mr. Lyall after fully discussing the tenure gave it as his opinion that these tenants were not tenants with a right of occupancy in the land held by them. The matter was however fully considered by Sir Michael Fenton, Financial Commissioner, in the Revenue Revision No. 204 of 1911-12, *Chowdhri v. Jassa*, which is printed as an appendix to [*Kirpa v. Tirhu* (3)]. The following extracts may be taken from this judgment:

"A very full account of the basiku opahu tenure is given in Mr. (Sir James) Lyall's Settlement Report (paras. 54-56). From it I gather that the following are distinctive incidents of the tenure: (a) the tenant was induced to settle down on the holding by the landlord; (b) he was required to live on or near the land, building the farm houses thereon. In this respect he differed from the opahu who lived in the village and was not a basiku; (c) though there was no deed or express verbal agreement there was an implied contract that the tenant should hold so long as he farmed well and paid the rent, 'or in other words ta qasur, that is, till commission of a fault against his tenure.' Now it is difficult to understand why there should be any hesitation in holding that tenants of the above class are entitled to any occupancy status. The vague and undefined liability to eviction for a fault against

tenure is nothing more than the liability which has since been brought under statutory definition and regulation in Ss. 38 and 39, Punjab Tenancy Act, 1887. That this liability was not in 1865 regarded as inconsistent with an occupancy status is, I think, sufficiently attested by the fact that at a meeting of Hamirpur proprietors convoked by Mr. Lyall in that year the response to the inquiry, whether by the custom of the country any class of tenants was entitled to the status of hereditary cultivator, was that basiku opahus were so entitled."

In conclusion Sir Michael Fenton held that a basiku opahu tenant was entitled to be regarded as occupancy tenant under S. 8, Tenancy Act, 1887. I agree fully with his reasoning. In *Kirpa v. Tirhu* (3) the Financial Commissioner draws attention to *Khairati v. Mannu Khan* (4), wherein Sir Lewis Tupper, after a full examination of previous published authorities, instanced four classes of cases in which a claim to an occupancy right under S. 8 may properly be decreed. One of the four classes consisted of the cases in which there had been a promise never to eject. A promise of this character need not necessarily be explicit. It may be implied, and may be established by evidence of the intentions of the parties as shown by their actions. And a promise not to eject does not mean a promise not to eject under all circumstances whatsoever, but a promise not to eject "ta qasur," using that expression as it has been defined in Sir Michael Fenton's judgment. Now in the cases before me it is admitted that the tenants and their predecessors have occupied the land as basiku opahus for 100 years and for three full generations, the present occupants apparently belonging to the fourth generation.

They have built houses on the land occupied by them and under all the circumstances I think it must certainly be inferred that there was an implied promise on behalf of the owners of the land not to eject them ta qasur. It is urged on behalf of the respondents that the facts in *Kirpa v. Tirha* (3) were different from those in the present cases, the distinguishing feature being that in that case the tenant cultivated on very favourable terms as regards rent, whereas in the present case the tenants pay half the produce as rent. I do not however see that this makes any difference. The main point in favour of the tenants is that there was an implied promise on

(1) [1918] 46 I. C. 811.

(2) A. I. R. 1919 Lah. 283=49 P. R. 1919=51 I. C. 443.

(3) [1918] 5 P. R. 1918 Rev.=46 I. C. 571.

(4) [1900] 6 P. R. 1900 Rev.



behalf of the landlords not to eject them. I consider that it would be extremely inequitable that such tenants after having been allowed to occupy the land for 100 years should now, when the land has become more valuable, be turned out by the landlords. I consider that the decision of the lower Court is in accordance with law and I dismiss the appeal with costs.

R.M./R.K. *Appeal dismissed.*

### A. I. R. 1919 Lahore 279

SCOTT-SMITH AND DUNDAS, JJ.

*Ghumandi Lal*—Appellant.

v.

*Kanhaya Lal & others*—Respondents.

Second Appeal No. 694 of 1916, Decided on 24th June 1919.

**Interest—Post diem**—To decide whether mortgagor is bound to pay post diem interest for whole term of mortgage, instrument must be looked at as whole and intention of parties gathered from deed.

In order to ascertain whether a mortgagor on redemption is bound to pay post diem interest for the whole term during which the mortgage has been in existence, the instrument must be looked at as a whole and the intention of the parties gathered from the deed: 19 *All. 39 (P.C.)*, *Foll.* [P 279 C 2]

Plaintiff sued for possession by redemption of a certain shop on payment of the mortgage-money. The mortgage sued upon contained a covenant to redeem at the expiry of 5 years by payment of the *zar-i-rahn*, a covenant to pay interest at Rs. 5 per annum in the meantime and an agreement that, on failure to redeem, the mortgagee shall be at liberty to realise the principal mortgage money, interest, costs, etc., from the property mortgaged;

**Held:** (1) that the mortgagor did not contemplate paying interest indefinitely;

(2) that it was evident that interest for 5 years at all events was made a charge on the property.

(3) that the fact that 5 years' interest was made a charge on the property showed that that should be paid at the time of redemption;

(4) that under the circumstances the plaintiff must be allowed to redeem on payment of principal, interest for the specified term and interest by way of damages for six years prior to suit: 95 *P. R.* 190, *Foll.* [P 280 C 1]

*Mohamad Shafi*—for Appellant.

*Tek Chand*—for Respondents.

**Judgment.**—This was a suit for possession by redemption of a shop at Ballabgarh, which was mortgaged with possession for a term of five years for Rs. 1,000 by a deed of 10th December 1880. The first Court decreed redemption on payment of Rs. 1,730 as follows:

Rs. 1,000, principal.

Rs. 720, interest for 12 years.

Rs. 10, improvements.

The lower appellate Court increased this amount by Rs. 1,300 on the view that the mortgagor was bound to pay interest at Rs. 60 per annum for the whole period between the date of the mortgage and redemption. The plaintiff has appealed urging that he can redeem on payment of the principal and interest for five years only, or at the outset on payment of interest by way of damages for an additional six years besides the interest for five years. Now the mortgage contains the following undertakings:

(1) A covenant to redeem at the expiry of the term of five years by payment of the principal mortgage money (*zar-i-rahn*); (2) a covenant to pay interest at Rs. 5 per mensem to the mortgagee in the meantime; (3) an agreement that on the mortgagor's failure to redeem as provided above the mortgagee shall be at liberty to realise the principal mortgage money, interest, costs of repairs and costs of Court from the property mortgaged. It is clear from the above that interest for five years at all events is made a charge on the property and in his cross-objections in the lower appellate Court plaintiff did not contest his liability to pay this and therefore cannot do so now. The question therefore narrows down to that of post diem interest.

We have been referred to many authorities as to whether a mortgagor on redemption is bound to pay post diem interest for the whole term during which the mortgage has been in existence. The leading case on the point is *Mathura Das v. Raja Narindar Bahadur* (1), wherein it is laid down by the Privy Council that in order to ascertain whether post diem interest is to be allowed, the instrument must be looked at as a whole and the intention of the parties gathered from the deed. It cannot be predicated with certainty without such examination whether the intention is that interest will continue to accrue as long as the principal money is unpaid, although there is a natural presumption in favour of this intention rather than that the mortgagor should have the use of the mortgage money without charge, or whether on the mortgagor's failure to redeem within the stipulated period the contract is to be regarded as broken and the mortgagee thrown back on a suit for damages. In the one case it is evident

(1) [1897] 19 *All. 39*—23 *I. A.* 198 (*P. C.*).



that the mortgagor will have to pay interest up to the date of redemption and in the other the mortgagees are entitled to recover principal and interest for the term of the mortgage plus interest for six years prior to suit by way of damages. The Calcutta High Court in *Moti Singh v. Ramohari Singh* (2) by a Full Bench judgment adopted this latter rule as their guide to ascertain the amount payable by a mortgagor to redeem, in a case where the mortgage did not specifically provide for post diem interest. The same rule was adopted in *Jawahir Mal v. Raja Shah* (3), when the Chief Court concluded that the mortgage could be redeemed only on payment of interest and post diem interest by way of damages accruing within six years of suit. This judgment appears to us to be very much in point looking to the wording of the mortgage now in suit.

The principal authority to the contrary in the Punjab is *Mota Singh v. Bishen Singh* (4), which again quotes the Privy Council decision in *Mathura Das v. Raja Narindar Bahadur* (1). On the wording of the deeds before the Court the Judges decided that interest must be calculated for the entire period during which the mortgage remained unpaid. There is one further point, namely, that the expression *zar-i-rahn* has been several times interpreted in the Punjab as meaning principal mortgage money, but excluding interest: *Aulia Khan v. Kanshi Ram* (5) and *Lok Chand v. Hazar Khan* (6). The present case however is distinguishable. The fact that five years' interest was made a charge on the property mortgaged shows that the intention of the parties was that that should be paid at the time of redemption. On an examination of the terms of the mortgage in suit we do not think that we can hold with certainty that the mortgage contemplated paying interest indefinitely. This being the case, we can fall back on the alternative provided by the Privy Council judgment of allowing redemption on payment of principal and interest for the specified term and interest by way of damages for six years prior to suit, including an item of Rs. 10 for improvements. This will

permit redemption on payment of Rupees 1,000 principal, Rs. 660 interest and Rs. 10 for improvements, or a total of Rs. 1,670. Accordingly we accept the appeal to the above extent, but as neither party has succeeded wholly in his contentions we leave them to bear their own costs throughout.

R.M./R.K. *Appeal partly accepted.*

### A. I. R. 1919 Lahore 280

RATTIGAN, C. J.

*Mt. Sahib Ji*—Plaintiff—Appellant.

v.

*Piru and others*—Defendants—Respondents.

Second Appeal No. 2019 of 1917, Decided on 17th May 1918, from decree of Dist. Judge, Rawalpindi, D/- 30th March 1917.

(a) Civil P. C. (1908), S. 149—Memorandum of appeal filed with insufficient court-fee due to bona fide mistake by pleader—Deficiency not made up in time—Court can exercise its discretion under S. 149.

Where owing to a bona fide mistake by the appellant's pleader as to the amount of court-fee requisite, a memorandum of appeal was filed with an insufficient court-fee stamp and the deficiency was not made up till after the expiry of the period of limitation:

*Held*: that this was a proper case for the exercise of the discretion vested in the Court under S. 149. [P 281 C 1]

(b) Civil P. C. (1908), O. 1, R. 9—Suit for possession against one set of defendants and for damages for dispossession against another set is not bad for misjoinder of causes of action.

A suit for the recovery of possession of immovable property from one set of defendants who have dispossessed the plaintiff therefrom, and for damages for dispossession against another set of defendants, the plaintiff's vendors, under a covenant is not bad for misjoinder of causes of action. [P 282 C 1]

*Madan Gopal*—for Appellant.

*Sheo Narain and Sewa Ram Singh*—for Respondents.

**Judgment.**—Plaintiff sued for two reliefs, viz., (1) recovery of possession of a house from defendants 2 and 3 who, as she alleged, had forcibly ejected her therefrom; and (2) for recovery of Rs. 700 from defendant 1, being the amount which plaintiff had paid to defendant 1 for the house, together with the value of certain improvements and additions which, she alleged, she had effected therein. The claim against defendant 1 was based on a covenant in the deed of sale whereby the vendor undertook that, if the vendee suffered on account of any legal right or defective title of the

(2) [1900] 24 Cal. 699 (F. B.).

(3) [1902] 95 P. R. 1902.

(4) [1916] 5 P. R. 1916=32 I. C. 821.

(5) [1913] 45 P. R. 1913=17 I. C. 677.

(6) [1917] 98 P. R. 1917=41 I. C. 59.



vendor, the latter would return the purchase money, together with compensation for any loss or damage suffered by the vendee. The Munsif held that there was a misjoinder of parties and causes of action and returned the plaint for amendment within a week. Plaintiff refused to amend her plaint, which was accordingly rejected. Plaintiff thereupon applied for review of the order directing amendment of the plaint and on this being refused, appealed to the District Judge of Rawalpindi, who agreed with the Munsif that there was a misjoinder both of parties and of causes of action and dismissed the appeal.

On the very last day of limitation, a second appeal was filed in this Court with a court-fee stamp of Rs. 2 only. It was brought to the notice of the appellant's pleader that the proper court-fee was Rs. 52-8-0, the amount actually paid on the memorandum of appeal in the lower appellate Court, but for some considerable time the learned pleader refused to comply with the request made to him that he should make up the deficiency in stamp. About twelve days later, however, he informed the office that on reconsideration, he had come to the conclusion that the full court-fee was payable and he paid in the amount requisite to complete the full stamp. Mr. Sheo Narain contends as a preliminary objection that the appeal in these circumstances is barred by virtue of the provisions of S. 149, Civil P. C., and there is no reason why the Court should show indulgence to the appellant whose pleader must have known that a court-fee of Rs. 2 was insufficient. For the appellant Mr. Madan Gopal takes the whole blame upon his own shoulders and states that he was in honest doubt as to the amount of court-fee requisite and that it was only when he was subsequently satisfied that the full fee had to be paid that he felt justified in expending the money which he had received from his client for the purposes of court-fee stamp. From this explanation it is clear that Mr. Madan Gopal's client was not herself at fault, and I think that I am justified in accepting the learned pleader's assurance that the delay was due to a bona fide mistake on his part. I accordingly exercise the discretion vested in me by S. 149, Civil P. C., in his favour. The question of law involved upon this

appeal is one of some difficulty and the only two authorities directly in point (both decisions of Division Benches of the Calcutta High Court) are in conflict. In *Serajul Huq Khan v. Abdul Rahaman* (1) the facts as stated in the judgment were these: The plaintiff purchased the land from defendant 2. Subsequently, after taking possession he was dispossessed by defendant 1. He accordingly sued, in consequence of his dispossession, to recover possession and asked for a decree for possession against defendant 1 and in default of his recovering possession, he sought for a refund of the purchase money paid by him to defendant 2. Upon these facts the learned Judges (Rampini and Pratt, JJ.) held that

"there would seem to be one cause of action in the case, namely, the dispossession of the plaintiff from the land,"

and they added that though the plaintiff sought for alternative reliefs, that fact did not make the suit one in which two causes of action were combined. In a subsequent case, *Guru Prasad Das v. Narendra Narain Maity* (2), the head-note runs as follows:

"Where the vendor agreed in a sale-deed that if the vendee be dispossessed from the land by the vendor, his heirs or representatives, he should be bound to refund the purchase money with interest:

*Held*: that those terms only impose on the vendor a responsibility for those claiming under him, and did not render him liable to guarantee the purchaser against dispossession by some one claiming under a title paramount.

Where the plaintiff joins a claim for possession of land against defendant 1 with a claim for damages against defendants 2 and 3, the vendors of the plaintiff:

*Held*: that the causes of action on which the two claims are based, are conflicting and hostile and cannot be conveniently tried together in one suit which is therefore bad for misjoinder of causes of action and must fail against defendants 2 and 3."

In their judgment the learned Judges (Harrington and Brett, JJ.) observed that "the plaintiff has joined a claim for possession of land against defendant 1 with a claim for damages against defendants 2 and 3.... The causes of action on which the two claims are based are conflicting and hostile and it is clear from the result of the trial in the two Courts that they could not be conveniently tried together in one suit. The suit is therefore bad for misjoinder of causes of action."

In this latter case the earlier decision of the Calcutta Court to which I have referred was not cited and does not appear to have been before the learned Judges

(1) [1902] 29 Cal. 257.

(2) [1909] 1 I. O. 361.



when they gave their decision. After full consideration of the two authorities to which I have alluded and to the arguments addressed to me by counsel, I have arrived at the conclusion that there was no misjoinder of causes of action in the present case. It is true that plaintiff's claim for a refund of her purchase-money and compensation is based on the covenant by defendant 1, but her right to recover under that covenant only came into play when she was dispossessed by defendants 2 and 3, or in other words, it was her dispossession by defendants 2 and 3 that gave her a right to recover money from defendant 1. The expression "cause of action" has been defined in two different ways: (1) as including every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court; and (2) in a more limited sense, as including only the facts constituting the infringement of the right, but not necessarily those constituting the right itself: see *Asa Singh v. Indar Singh* (3) and *Haramoni Dassi v. Hari Churn Chowdhury* (4).

It appears to me that in the present case, there was but one cause of action in the proper sense of the term, whether we accept the wider or the more limited definition. It is a general principle of law that every suit shall be so framed as to afford ground for final decision upon the subjects in dispute and to prevent further litigation concerning them (O. 1, R. 1, Civil P. C.), and further it is not necessary that every defendant shall be interested as to all the reliefs claimed in any suit against him (O. 1, R. 5, Civil P. C.). Applying these general principles to the facts before me, I am of opinion that it was very necessary, if multiplicity of suits was to be avoided, that a decision should be arrived at which would be binding upon the plaintiff and all three defendants, and obviously this could only be done by bringing one suit and joining the three defendants as co-defendants thereto. From the point of view then of general policy and convenience as well as from that of the strict letter of the law, I am of opinion that the suit, as framed, was in accordance with the provisions of the Civil Procedure Code and that there was no mis-

joinder of causes of action. On the contrary, I hold that there was in reality, one cause of action against all the defendants and that was the dispossession of the plaintiffs. I accordingly accept this appeal and, setting aside the orders of the lower Courts, remand the case to the Court of the Munsif, 1st Class, for trial and determination in accordance with law. Costs will abide the event.

R.M./R.K.

Appeal accepted.

## A. I. R. 1919 Lahore 282

BROADWAY, J.

*Mt. Chhoto*—Plaintiff—Petitioner.

v.

*Mt. Sona Devi* and others—Defendants—Opposite Parties.

Civil Revn. Petn. No. 821 of 1918, Decided on 25th February 1919, against order of Dist. Judge, Delhi, D/- 1st August 1918.

Punjab Courts Act (3 of 1914), Ss. 41 (3) and 44 — District Judge refusing certificate without considering application on merits — Revision is competent.

Plaintiff sued to recover possession of certain land that had been gifted to her father. The suit was contested by the descendant of the original donor and was dismissed by the District Judge, who held on appeal that as the daughter could not succeed as heir to her father the descendants of the donor could not be ousted. Plaintiff then applied for the grant of a certificate under S. 41 (3), but the application was rejected without any reference being made to the questions raised. Plaintiff filed a petition of revision to the Chief Court :

*Held* : (1) that inasmuch as the District Judge had made no reference to the questions raised in the application he had committed an irregularity and his order was open to revision, (2) that the case must therefore be remanded to the District Judge to consider the application on the merits :  
44 I. C. 732, *Foll.* [P 293 C 1]

*Moti Sagar* and *Shamair Chand*—for Petitioner.*Obbard*—for Opposite Parties.

**Judgment.**—This is an application for revision of an order of the District Judge of Delhi, dated 1st August 1918, refusing to grant a certificate under S. 41 (3), Punjab Courts Act. The facts of the case are practically on all fours with those in *Mt. Chinti v. Ishar* (1), a decision that the learned District Judge has apparently completely lost sight of. The plaintiff claimed possession of certain lands that had been gifted to her father. The contesting defendant was a descendant of the original donor, and it was contended that as the daughter could not succeed as heir to her father, the descen-

(3) [1898] 91 P. R. 1898.

(4) [1895] 22 Cal. 833.



dants of the donor could not be ousted. This contention was given effect to by the learned District Judge on appeal in spite of the decision reported as *Mt. Chinti v. Ishar* (1) referred to above.

The plaintiff then applied for the grant of a certificate alleging that the questions involved were: (1) whether a daughter does not succeed to "gifted" land in preference to the descendants of the donor; and (2) whether a daughter does not succeed to acquired property in preference to persons in no way related to her father. In refusing to grant the necessary certificate the learned District Judge made no reference to the first question and has therefore committed an irregularity. Following the course adopted in *Sarup Singh v. Mt. Jowahri* (2), I accept this application and remand the case to the District Judge in order that he may consider this question and come to a decision whether to grant a certificate regarding it or not. Costs will follow the event.

R.M./R.K.

Case remanded.

(1) [1918] 100 P. R. 1917=43 I. C. 299.

(2) [1918] 18 P. R. 1918=44 I. C. 732.

### A. I. R. 1919 Lahore 283

SCOTT-SMITH, J.

*Parman*—Defendant—Appellant.

v.

*Ghanthu*—Plaintiff—Respondent.

Second Appeal No. 1429 of 1917, Decided on 8th April 1918, from decree of Addl. Judge, Kangra, D/- 10th February 1917.

Punjab Tenancy Act (16 of 1887), Ss. 77 (3) (d), Prov. (i) and 100 (3) — Suit for possession by occupancy tenant—Claim to right of occupancy can be determined only by Revenue Court—Duty of civil Court is to return plaint for presentation to Collector—Jurisdiction.

Plaintiff sued for possession of certain land on the allegation that he was an occupancy tenant thereof under S. 8, Insolvency Act, and had been illegally dispossessed by the landlord defendant. It appeared that the defendant had applied for a notice of ejectment to be served upon the plaintiff who was a tenant under him, and that upon this the plaintiff had filed a suit in the Revenue Court contesting his liability to ejectment on the ground that he was an occupancy tenant. This suit was dismissed on the ground that the plaintiff had failed to establish occupancy rights. Thereupon he filed the present suit in a civil Court:

*Held*: (1) that although the suit was one for possession of the land comprised in the tenancy, yet in order to succeed therein the plaintiff had to establish a claim to a right of occupancy and as that was a matter which could be determined only by a Revenue Court under S. 77 (3) (d), it

was the duty of the civil Court in which the suit was instituted to act in accordance with the instructions contained in the proviso to S. 77 and return the plaint for presentation to the Collector; (2) that as the plaintiff had been prejudiced by the mistake as to jurisdiction the Chief Court would not pass an order under S. 100 (3). [P 283 C 2; P 284 C 1]

*Jagan Nath* for *Tek Chand* — for Appellant.

*Fakir Chand*—for Respondent.

**Judgment.**—In the suit out of which the present appeal arises the plaintiff sued for possession of certain land, on the allegation that he was an occupancy tenant thereof under S. 8, Punjab Tenancy Act, and had been illegally dispossessed by the landlord defendant. The Courts below have concurred in holding that plaintiff has a right of occupancy and have decreed the claim. Defendant has filed a second appeal to this Court, and the first point urged on his behalf is that the civil Courts had no jurisdiction to hear the suit. The question of jurisdiction was raised in the first Court which decided, relying upon *Kharku v. Dittu* (1), that the suit was cognizable by a civil Court. The question of jurisdiction was again raised in the lower appellate Court but was withdrawn at the time of arguments. The plaintiff was a tenant under the defendant who applied for a notice of ejectment to be served upon him. Upon this plaintiff filed a suit in the Revenue Court, contesting his liability to ejectment on the ground that he was occupancy tenant of the land from which he was sought to be ejected. The Assistant Collector decided against the plaintiff, holding that he had failed to establish occupancy rights. Thereupon he was duly ejected in May 1915. He then filed the present suit in a civil Court. In order to succeed it was necessary for the plaintiff to establish a claim to a right of occupancy, and a suit by a tenant to establish a claim to a right of occupancy is triable by a Revenue Court under S. 77 (3) (d), Punjab Tenancy Act.

The present suit, no doubt, is one for possession of the land comprised in the tenancy, but in order to succeed the plaintiff had to establish a claim to a right of occupancy, and the proviso to S. 77, Tenancy Act, lays down that where in a suit cognizable by and instituted in a civil Court it becomes necessary to decide a matter which can under sub-S. 3 be

(1) [1893] 70 P. R. 1898.



heard and determined only by a Revenue Court, the civil Court shall endorse on the plaint the nature of the matter for decision and the particulars required by O. 7, R. 10, Civil P. C., and return the plaint for presentation to the Collector. This proviso was added to the section by Punjab Act 3 of 1912, and therefore *Kharku v. Dittu* (1) relied upon by the first Court is not in point. A tenant after dispossession from his tenancy is no longer a tenant, and therefore the present suit is not one by a tenant and is *prima facie* cognizable by a civil Court, but the question which has to be decided is whether plaintiff, who at the time of his dispossession was a tenant, had a right of occupancy. Now the question whether a tenant has a right of occupancy is a matter which can under sub-S. 3 (d), S. 77 be heard and determined only by a Revenue Court, and therefore in my opinion the proviso aforementioned applied and it was the duty of the civil Court in which the suit was instituted to act in accordance with the instructions contained therein.

It is urged, by appellant's counsel that his client has been prejudiced by the mistake as to jurisdiction as, if the case had been sent at once to the Collector by the Munsif, he would have raised the plea that the suit was barred by S. 11, Civil P. C. I think this argument has force, and I shall therefore not take action under S. 100 (3), Tenancy Act. I accept the appeal and set aside the orders of the Courts below and direct the Munsif to act in accordance with the proviso to S. 77, Tenancy Act. Stamps in this and in the lower appellate Court will be refunded and other costs will be costs in the case.

R.M./R.K. *Appeal accepted.*

### A. I. R. 1919 Lahore 284

BROADWAY, J.

*Khadam Ali*—Convict—Petitioner.

v.

*Emperor*—Opposite Party.

Criminal Revn. Petn. No. 725 of 1918, Decided on 17th February 1919, from order of Sess. Judge, Gurdaspur, D-/27th May 1918.

(a) **Criminal Trial—Accomplice—Mere presence without taking any part does not make one accomplice.**

Persons present when money is given to a bribe taker cannot be said to be accomplices, unless they have co-operated in the payment of

the bribe or taken some part in the negotiations for its payment : 33 Cal. 649, *Foll.* [P 286 C 2]

(b) **Criminal Trial—Evidence—Independent witnesses not independent illustrated—Trial for extorting bribe—Witnesses taking some part or other—Their evidence is not reliable—Penal Code (45 of 1860), S. 160.**

Where the accused, a Sub-Inspector of Police, was charged with extorting a bribe from one N and it was found that one of the prosecution witnesses on his own showing took an active share in raising the money for the payment of the bribe, knowing for what purpose the money was required, while another interceded for N, and induced the accused to accept a certain sum instead of the large sum he was claiming and yet another took an active part in the negotiations for the payment of the bribe :

*Held* : that these witnesses could not be regarded as independent and their evidence was not wholly free from taint. [P 287 C 1]

*M. Rafi and Tek Chand*—for Petitioner.

**Judgmen.**—This is a petition for the revision of an order of the Sessions Judge, Gurdaspur, dated 27th May 1918, upholding an order of Mr. G. B. Wilson, I. C. S., Magistrate, 1st Class, dated 16th April 1918, convicting the petitioner of an offence under S. 161, I. P. C., and sentencing him to two years' rigorous imprisonment and to pay a fine of Rs. 300 or in default to undergo rigorous imprisonment for a further term of six months.

The petitioner, Khadam Ali, was a probationary Sub Inspector of Police in charge of the Police Station of Narot Jaimal Singh and the story for the prosecution briefly is that on 11th November 1917, having received information that one Nanak Chand was distilling liquor, he, the petitioner, went to the spot and searched the shops and house of the said Nanak Chand and found incriminating articles. He is then said to have taken Narak Chand and his son Birju to the police station and detained them there until he had been paid Rs. 60 as a bribe: (1) for releasing them on bail, and (2) for undertaking not to send Birju up for trial. As a matter of fact Nanak Chand and Birju were both sent up for trial and charges were framed against both of them on 6th December 1917. On 19th December 1917 Nanak Chand sent a petition to the Deputy Commissioner complaining that Khadam Ali was a dishonest man and had extorted a bribe of Rs. 60 from him (Nanak Chand) and naming other persons from whom bribes had been taken. The Deputy Commis-



sioner directed the Superintendent of Police to have this matter enquired into, with the result that Khadam Ali was proceeded against and convicted, as stated above.

Mr. Tek Chand has contended that the Courts below have misdirected themselves as to what persons are accomplices and as to the nature of the evidence necessary to corroborate the evidence of an accomplice. Further he has drawn my attention to certain discrepancies in the evidence for the prosecution and has commented on the unblemished character borne by the petitioner in the past. Both the Courts below have dealt at length with the evidence produced by the petitioner in his defence and have held that this evidence does not establish his innocence. The real question however is whether the evidence for the prosecution proves Khadam Ali's guilt and it is therefore necessary to see what that evidence is and how far the witnesses can be regarded as worthy of credence. These witnesses are: P. W. 1, Nanak Chand Mahajan; P. W. 2, Behari Lal Mahajan; P. W. 3, Mt. Mohran, wife of Nanak Chand; P. W. 4, Achhar Mahajan; P. W. 5, Milkhi Mahajan; P. W. 6, Chet Ram Khatri; P. W. 7, Karm Chand Mahajan; all of Narot Jaimal Singh.

P. W. 1 Nanak Chand's story is that his shop was searched on 11th November 1917 in his absence, but that he reached there at about 11-30 a. m., and at 12 noon he and his son Birju were taken to the police station where they were kept in separate rooms. Some half a ghari after being taken to the police station, Karm Chand reached there and after having been kept at the police station all day, at about a ghari before sunset Karm Chand told him (Nanak Chand) that the Sub-Inspector demanded Rs. 100 before he would release them on bail and that on payment Birju would not be challaned. Budhu and Milkhi were at that time standing under a tree inside the police station some five yards away and Nanak Chand asked Milkhi to go to his house and ask his (Nanak's) wife to arrange for some money. About sunset Achhar arrived and Nanak Chand was called into the deohri by the petitioner and Karm Chand, where he found Chet Ram and Budhu as well. In the presence of all these persons Achhar handed Nanak Chand some money wrapped in cloth,

saying it was Rs. 60 which he had raised by pawning jewelry, belonging to Nanak's wife, with Behari. Nanak Chand handed the money to the petitioner who said it was not enough, but Karm Chand induced him to accept it saying that Nanak Chand was a poor man. The station moharrir was then summoned and Nanak Chand and Birju were released on bail, Milkhi standing surety for Nanak Chand, and Budhu for Birju. According to this witness it was then "after lamp lighting time."

P. W. 5, Milkhi's statement is that at "laudewela" (about 3 p. m.) Mt. Mohran sent him to the police station, saying her husband had been taken there under arrest and asking him to stand surety for him. On reaching the police station he found Karm Chand and the petitioner sitting in the deohri and asked the latter "if Nanak Chand could be let off on bail." The petitioner replied, "how could bail be taken in this way?" which led the witness to understand that money was required. The petitioner then went to the room where Nanak was, leaving Karm Chand in the deohri, and abused him, whereupon Nanak Chand beckoned to the witness, who went to him and was told to go and tell Achhar to get jewelry from Mt. Mohran and raise Rs. 70 to 90 or as much as he could on them "as the thanedar would not allow security without payment." He was also asked to get another man to act as security. Milkhi went to Achhar and gave him the message, after which he went and brought Budhu to the station, where the two of them sat under a tree in the deohri in which Karm Chand and the petitioner were also seated. A ghari later Chet Ram arrived there in search of Karm Chand, who was wanted by Chet Ram to go and attend his (Chet Ram's) wife, Karm Chand however asked Chet Ram to wait and he sat down there as well.

After this, Achhar arrived Nanak Chand was called out and Achhar handed him a piece of cloth, saying he could only raise the Rs. 60 it contained and went away. Nanak then handed the money to the petitioner saying he was a poor man and could raise no more. The petitioner objected but Chet Ram pleaded for Nanak Chand and finally the money was accepted. Karm Chand is said to have warned the petitioner against "spoiling" the



case. The surety bonds were then written and they went away the time being khaupio (about 7 p. m. to 9 p. m.).

P. W. 4, Achhar, states that Billu (Milkhi) came to him at tarkalavela (after sunset) and said that Nanak wanted witness to get jewelry from Nanak's house and raise as much as he could on it and take it to him at the Police Station. The witness went to Nanak's house and got some jewelry from Mt. Moharn which he took to Behari who advanced him Rs. 60 on it. An entry was duly made in Behari's bahi and Achhar took the money to the Police Station and handed it over to Nanak in the presence of Chet Ram, Karm Chand and the petitioner saying it was all he could raise on the jewelry. The witness then went away. P. W. 3, Mt. Moharn, wife of Nanak Chand, supports Achhar, saying that he had come to her at tarkalawela (after sunset) and said that he had been sent by Nanak Chand to get jewelry which he was to pawn in order to raise money for the thanedar.

P. W. 2, Behari's evidence is to the effect that when the lamps were being lit Achhar came to him with some jewelry saying it belonged to Nanak who wanted to raise money on it. He advanced him Rs. 60 on the jewelry, the transaction being entered in his account book. P. W. 7, Karm Chand's account is that he had sent Gopala to the Police Station to give information about the distilling of liquor and had been present at the search when incriminating articles were found which were taken to the Police Station at about noon the two suspects Nanak Chand and Birju also being taken there. At about laudewela (3 p. m.) Milkhi arrived at the station and asked whether security could be taken. The petitioner's reply led witness to understand that payment was demanded. Milkhi sat down and the petitioner went alone to where Nanak Chand was and abused him. Nanak then beckoned to Milkhi who went to him and they had some conversation after which Milkhi went away.

Half an hour later Milkhi returned with Budhu. After their arrival Chet Ram came to call witness who could not however go without the petitioner's permission and so Chet Ram also sat down. Ten or fifteen minutes later Achhar came and on Nanak coming out handed over

a bundle of money saying he could only raise Rs. 60 and then went away. Nanak made the money over to the petitioner who said it was not enough but Chet Ram said Nanak was poor and the money was ultimately accepted. The surety bonds were then drawn up and they all went away the time being about 9 p. m.

P. W. 6, Chet Ram supports this story saying that he had returned to his village in the afternoon and finding his wife ill went in search of Karm Chand whom he ultimately found at the Police Station. Karm Chand asked him to wait a little telling the petitioner that his presence need not disturb him (petitioner). Half a ghari later Achhar arrived and Nanak was called out. Achhar told him he had been able to raise Rs. 60 only, which he gave over in some cloth and then went away. Nanak handed this money over to the petitioner who said it was too small a sum but ultimately yielded to Nanak's pleadings and witness's intercession and accepted it after which the surety bonds were written and they all went away the time being khaupio wela.

I have summarised the evidence for the prosecution in order to see how far each witness can be regarded as an accomplice or a mere innocent participator in the transaction. The learned Sessions Judge has held that though Nanak Chand is clearly an accomplice Mt. Moharn, Behari Achhar and Milkhi cannot be said to come within that category having regard to the decision reported as *Deo Nandan Pershad v. Emperor* (1), while Chet Ram is an independent witness. Karm Chand has been looked on as reliable although admittedly he has grounds for disliking Khadam Ali.

In *Deo Nandan Pershad v. Emperor* (1) it was held that persons present when money was given to a bribe-taker could not be said to be accomplices unless they had co-operated in the payment of the bribe or taken some part in the negotiations for its payment. This view has been accepted by this Court in *Barkat Ali v. Emperor* (2) and *Ghulam Muhammad v. Emperor* (3) and it is one in which I am in complete accord. I cannot however agree that in the present case Nanak Chand alone can be regarded as an accomplice. Milkhi on

(1) [1906] 33 Cal. 649.

(2) [1916] 2 P. R. 1917 Cr.=36 I. C. 861.

(3) [1916] 9 P. R. 1917 Cr.=39 I. C. 680.



his own showing took in active share in raising the money for the payment of the bribe knowing for what purpose the money was required. Chet Ram too cannot be regarded as a wholly independent witness for he admits that he interceded for Nanak Chand and induced the petitioner to accept Rs. 60 instead of the larger sum he was claiming.

As to Karm Chand while he claims to be a mere looker on Nanak Chand's statement is clear and is to the effect that Karm Chand took an active part in the negotiations for the payment of the bribe and I am unable to regard this witness's evidence as wholly free from taint. Achhar Behari and Mt. Mohran are however witnesses who are not accomplices. If however the story told by Milkhi, Chet Ram and Karm Chand is otherwise credible the discredit attaching to their evidence on account of being accomplices may be very slight. Mr. Tek Chand contended that Nanak Chand was so obviously actuated by vindictive feelings that his story must be most carefully scrutinised and I consider that there is a good deal of force in this contention. Apart from this particular cause of rancour Nanak Chand had another grievance against Khadam Ali. One Alla Ditta and Munshi, a son of Nanak Chand were accused of an offence during the hot weather of 1917 and Khadam Ali was actively engaged in trying to get them arrested. Karm Chand, P. W. 7, was suspected of assisting Alla Ditta who was however ultimately captured, tried and convicted. Munshi however absconded. Now it is perfectly safe to assume that Khadam Ali would bring pressure to bear on Munshi's family members in order to ascertain his whereabouts and Nanak Chand admits that the petitioner had asked him "to produce" his son in Alla Ditta's case but that his son had then gone away. After a very feeble attempt at suggesting that Munshi had gone to Burma he was constrained to admit that since Munshi had been "wanted" by the police he had never been heard of. Some of the other witnesses have suggested that Munshi had left home owing to a quarrel with his wife but this is clearly shown to be false by the fact that Mt. Mohran states that the said wife died some three or four years ago. There can I think be no doubt that Munshi's departure from his home

is directly due to the efforts made by the police at the immediate head of which was the petitioner to effect his arrest. It may be safely assumed therefore that Nanak Chand had no particular friendly feelings towards Khadam Ali on 11th November 1917.

When this fact is borne in mind the delay in Nanak Chand's complaint acquires more importance than the Courts below have accorded to it. According to Nanak Chand's statement in Court the consideration for the bribe was: (1) that he and Birju were to be admitted to bail and (2) that Birju was not to be sent up for trial. I must admit that I am exceedingly sceptical of Nanak Chand's assertion that he was not aware that the offence with which he was charged was a bailable one. The fact that Milkhi says that he was sent to the police station to offer bail is an indication that the bailable nature of the offence was a matter of common knowledge. There is however force in the learned Sessions Judge's remark that police officers make a favour of doing what they are legally bound to do by itself; therefore this matter is not of any great importance and does not affect the question of the delay.

The more important consideration was the undertaking not to proceed against Birju. On 17th November 1917, however Khadam Ali sent up both Nanak Chand and Birju for trial. There was thus a serious breach of faith on the petitioner's part within a very few days and had the complaint been made shortly after 17th November 1917, the delay would have been explicable enough. On 16th December 1917 charges were framed against both the accused and still no action is taken till 19th December 1917. In these circumstances I do not think that this question of delay can be brushed aside as lightly as it has been. The more so when the circumstances under which the complaint was written, and its contents are, examined.

A perusal of the complaint discloses the fact that Khadam Ali was accused of having "beaten" Nanak "very harshly" and threatened to put him in the lock up "under iron fetters" unless a bribe was given, and that it was in order to escape ill-treatment and avoid being thrown in to the havalat that the money was paid.



The more important undertaking not to send up Birju for trial is not even hinted at while a list of 15 other instances of Khadam Ali having received bribes is detailed. It seems to me of some significance that none of the witnesses who have appeared in Court make any reference to this question of Birju not being sent up for trial. It is obvious that Nanak Chand's evidence cannot be regarded as worthy of any great credence. Now as to the circumstances under which the complaint was written. The scribe is one Ram Das, who has not been produced as a witness. He is the compounder in the Narot hospital, and in charge of this hospital was Sub-Assistant Surgeon Partab Singh, who had the misfortune, on 19th November 1917, to cause the death of a sweeper by hitting him. It fell to Khadam Ali's lot to inquire into this matter and he arrested Partab Singh on a charge under S. 304, I. P. C. The case was however struck off on 30th November 1917, the offence being regarded as one under S. 323, I. P. C. In the circumstances I do not think it is straining matters too far to conclude that Partab Singh (who is a Mahajan) would not regard Khadam Ali's action in arresting him as a particularly friendly one. In any event Nanak Chand says that Ram Das came to his shop one evening about 1½ pahars before sunset to drink sharbat and was asked to write the "letter". He promised to return for the purpose and did so when this complaint was written by him. Nanak Chand is absolutely positive that Ram Das only wrote what Nanak Chand dictated to him and imported nothing from his own knowledge. As has been said above, this complaint contains a list of 15 instances of bribe taking by Khadam Ali. This list is drawn up in two columns, one giving: "This place wherefrom Sub-Inspector took bribe" and the other column giving "the name of the person (and the amount), who gave the bribe to the Sub-Inspector". The information given in the list was fairly specific and detailed and as was to be expected, Nanak Chand was cross-examined as to the source of his information regarding these various instances. A perusal of his cross-examination shows that he broke down completely. First he stated that

"People who used to come and drink sharbat at my shop told me that they had given bribes to

the thanedar. One said the thanedar had challaned him, his name was Billu".

Then he went on to say that:

"Billu did not come to me. I do not know who told me about Billu several people told me. It was one or two days before I dictated my petition. Concerning the other bribes also I came to know two or three days before dictating the petition. I do not remember anybody who told me about any bribe".

When asked to give the names of the persons entered in the list, he was only able to give a few and saying he could remember no more, stated "I am not in my proper senses now" and that none of the people named by him had told him they had given bribes, but that people of their village told him so. Finally on being recalled by the Court he admitted that Ram Das supplied some of the names. It is impossible not to come to the conclusion that the complaint forwarded by Nanak Chand was the result of collaboration with others and that the information it contained was supplied by other persons. Who these persons were is of course a pure matter of conjecture, but the fact that Ram Das was the scribe and gave some of the names lends colour to the contention advanced by Khadam Ali that Partab Singh had a hand in the matter. In any event I think that there can be no doubt that this complaint was the result of a conspiracy on the part of persons who did not like Khadam Ali, and for this reason I consider that the evidence on the record needs careful scrutiny and that discrepancies, which in other circumstances might be ignored, must be given more weight to. Now the first point commented on by counsel was that the witnesses are more or less related to Nanak Chand though they deny the relationship. Of the six witnesses who supported Nank Chand's story Mt. Mohran is his wife, Milkhi and Achhar are his collaterals and Behari is related by marriage to Mt. Mohran's sister. Doubtless in an affair of this kind Nanak Chand would naturally ask the assistance of his friends and relatives so that this relationship cannot be allowed to weigh too heavily against the prosecution. It cannot however be entirely ignored, especially when efforts are made to conceal its existence.

Referring to Mt. Mohran, it will be seen that she has made an important admission that tells greatly in favour of the petitioner. The whole story about the pawning of the jewelry is rendered suspi-



cious if there was no real need for raising money by such a method. For the petitioner it was alleged that during the search of Nank Chand's house a potli was discovered containing Rs. 100. If this is correct then it is obvious that the necessity for raising money by pledging ornaments disappears. Nanak Chand states that he does not know whether the women of his house had any money with them. He also says that he told Milkhi to tell his wife to "make arrangements for money." In other words, he does not deny that there was money in the house and it seems a little unlikely that his wife would have had some unknown to him. Now Mt. Mohran first admitted that a potli had been found in her trunk and then professed to know nothing of the potli. She then went on to say that "Achhar asked for ornaments and not for money," the inference being obvious that she gave what was asked for and it was only when the Court questioned her that she said that she had no money and therefore gave ornaments to Achhar and that "No one used to tell me how much money the potli contained. The potli was mine." There is evidence for the defence as to the discovery of this potli which contained Rs. 100 but setting this evidence aside I cannot see how there can be any doubt that a potli was found as alleged by Khadam Ali. The Sessions Judge seems inclined to doubt this discovery because there was "no documentary evidence of the discovery of this money," and considers it

"quite likely that Nanak and his friends thought it advisable to borrow the money in order to secure documentary corroboration of their story."

I do not see what documentary evidence could have been produced. The house was searched in connexion with an offence under the Excise Act, and it is not customary for the police to make an inventory of everything in a house that is searched even though nothing connected with the matter under enquiry is discovered. The discovery of the potli is however admitted by its owner, Mt. Mohran. Then as to Nanak and his friends desiring to secure "documentary corroboration" of their story—this surely presupposes that they had at that time an intention of telling their story—but this is not even suggested by Nanak or any of his witnesses and is negatived by the delay in making the complaint.

1919 L/37 & 38

After a careful and anxious consideration of this part of the case I am forced to the conclusion that there was money available in the house and that therefore it was not necessary to raise it by pledging ornaments. The necessity for securing "documentary corroboration" would however arise when it was decided to tell the story and it would be natural then to seek the assistance of relations. Nanak Chand definitely says that he told Milkhi to go to Mt. Mohran and ask her to arrange for some money.

He makes no mention of jewelry at all. Milkhi however asserts that Nanak Chand told him to go to Achhar and tell him to go to Mt. Mohran and ask for ornaments on which he was to raise money, and that he conveyed the message to Achhar. In this he is supported by Achhar but no adequate reason is given for Milkhi to have gone to Achhar instead of carrying out Nanak Chand's instructions himself. Mt. Mohran would have given the ornaments to Milkhi as readily as to Achhar, and the conclusion is irresistible that Achhar has been dragged in in this way to be put forward as a witness who could not be classed as an accomplice. He does not profess to know why the money was needed and he is careful to go away from the police station before the money was handed over to the petitioner. He attempts to deny all relationship with Nanak Chand and his wife, though he is their collateral in the fifth degree and lives in the same enclosure as they do, as also does Milkhi.

Further it is by no means apparent why it was necessary to pawn any jewelry in order to get the money from Behari. Admittedly Achhar has dealings with Behari, who is a brother cloth merchant and they give each other credit for goods taken from each other. According to Achhar he handed the ornaments to Behari and asked for Rs. 70. Behari weighed them and said he would give Rs. 60 and if Achhar was not satisfied, he could go. Behari's account is that Achhar asked for only Rs. 60, which he gave him after he had weighed the ornaments. Like Achhar, Behari also claims to have had no knowledge of the purpose for which the money was being borrowed by Nanak Chand. Finally the bahi in which the entry appears in a chaupatra which is unpagged, and the entry is the last in



the book and could easily have been made at any time.

I have given my most careful consideration to the evidence of these witnesses and am forced to record it as wholly unworthy of credence. I am unable to bring myself to believe that there was any need to borrow any money by pawning ornaments, and I am convinced that the whole of this portion of the story is a fabrication. In these circumstances the evidence of Milkhi and Nanak Chand requires a good deal of corroboration before it can be accepted. The only other evidence in the case is that given by Karam Chand and Chet Ram. If Nanak Chand is to be believed, Karm Chand took an active part in the negotiations for he says that it was Karm Chand who informed him that the petitioner wanted Rs. 100 for releasing the two on bail and not proceeding against Birju and that it was Karm Chand who interceded for him when the petitioner refused to take only Rs. 60. Karam Chand denies this flatly. One of these two is speaking the untruth. Karm Chand was suspected of having harboured Alla Ditta (referred to above). He was one of the two men who stood surety for Partab Singh when he got into trouble, and he complained to D. W. 30, Babu Chatter Singh, Revenue Officer (since retired), on 9th December 1917 that the petitioner was siding with his (Karm Chand's) opponent in connexion with a dispute relating to crops. It is also stated that the petitioner was warned to keep an eye on Karm Chand. All these circumstances tend to detract considerably from the value of Karm Chand's evidence in spite of his being a Kursi nashin and the possessor of a number of chits. That he had cause to dislike Khadam Ali seems to be clear and his connexion with Partab Singh is a matter that cannot be lightly put aside. I am not prepared to accept his account of what occurred.

There remains Chet Ram who has been regarded as an independent witness by the learned Sessions Judge. His intimate connexion with Karm Chand however renders his evidence suspicious to my mind, and I regard his presence at the Police Station as extremely improbable. He had nothing to do with the excise case and appeared just in time to witness the payment of the bribe and to intercede for Nanak Chand—an intercession that was

accepted although the petitioner had wanted Karam Chand to send him away. He had been to Paniar on business that day and there is evidence on the record to show that it would take some five hours to travel from there to Narot Jimal Singh owing to the heavy rain that had fallen in those days. I have very grave doubts as to his presence in the village that day.

The Courts below have given a good deal of weight to what they consider the unnecessary prolongation of the proceedings on 11th November 1917 as entered in the case diaries. I am however unable to see that there was any suspicious delay in, or prolongation of the inquiry, which appears to have been conducted in the customary manner. No one seems to have gone to the police station to stand surety till Milkhi went and then he had to get Budhu. The evidence shows that very soon after Budhu and Milkhi arrived the two men concerned were admitted to bail. I am convinced in my own mind that the case is a fabrication from beginning to end, and I accordingly accept this petition set aside the conviction and sentence and acquit the petitioner.

R.M./R.K. *Petition accepted.*

### A. I. R. 1919 Lahore 290

SHADI LAL AND LEROSSIGNOL, JJ.  
*Rawel Singh and another—Appellants.*  
v.

*Jai Ram—Respondent.*

Second Appeal No. 3359 of 1917, Decided on 20th November 1918, from decree of Dist. Judge, Jhelum, D/- 27th August 1917.

(a) **Hindu Law — Succession — Exclusion from—Congenital lameness is disqualification—Person moving about with assistance of crutches is not disqualified.**

According to the Hindu law lameness which is congenital is a disqualification for purposes of succession. Lameness which is not complete, as where a person is able to move about with the assistance of crutches, is not a disqualification.

[P 291 C 2]

(b) **Hindu Law — Succession — Exclusion from—Murder committed to hasten succession—Member not party to murder is not disqualified.**

A person is not debarred from succeeding merely on the ground that a member of his family committed murder to hasten the succession, where the former was not a party to the murder and the benefit to him was not present in the mind of the murderer.

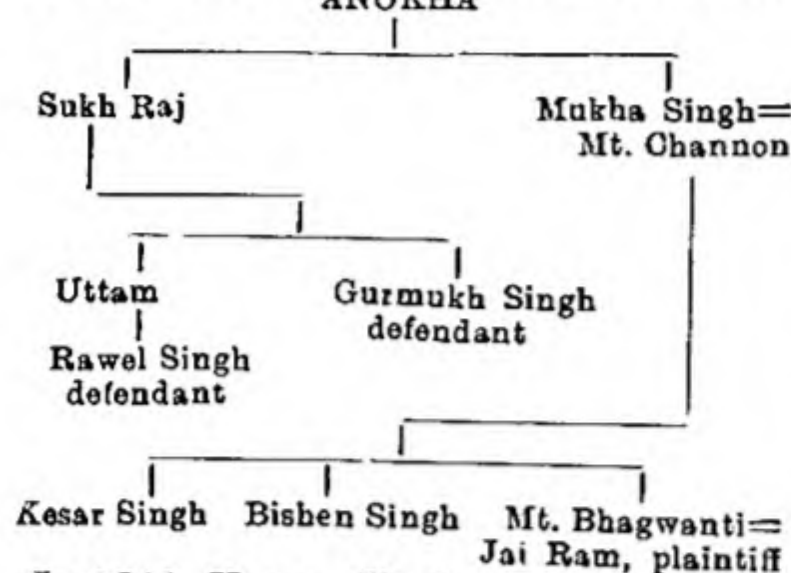
[P 291 C 2]

*D. R. Sawney—for Appellants.*

*Gokal Chand Narang—for Respondent.*



**Judgment.** — The following is the pedigree-table of the parties in this case:



In 1911 Kesar Singh, Bishen Singh and their mother Mt. Channon were murdered and Uttam Singh was convicted as their murderer and was hanged. Mt. Bhagwanti, the daughter of Mt. Channon, in the absence of her brothers succeeded to the property now in dispute and remained in its enjoyment until her death, which took place shortly before the institution of this suit whereupon the defendants, Gurmukh Singh and Rawel Singh, both minors, took possession of the property. The plaintiff, who is the husband of Mt. Bhagwanti deceased, claims the property. His suit was dismissed by the first Court, but the learned District Judge has decreed for him on the ground that Rawel Singh, being the son of the murderer, Uttam Singh, is disqualified from taking the succession, whilst Gurmukh Singh is also disqualified by the reason that he was a member of the joint Hindu family constituted by him and Uttam Singh and Rawel Singh and therefore cannot be allowed to benefit by the murder committed by a member of the family.

The parties are Hindu Khatri and admittedly are governed by the personal law, and even if the case of Rawel Singh fails, plaintiff, in order to achieve success must show that Gurmukh Singh is disqualified. On behalf of the appellants it has been urged before us that under Hindu Law the son of a disqualified, heir is not himself disqualified, and it is further pointed out that under Hindu Law a son has a right of succession independent of his father. But these are considerations which affect only the case of Rawel Singh and need not be discussed at this juncture, because if Gurmukh Singh has a good title, he would exclude the plain-

tiff. Now at the time of the murder Gurmukh Singh was, and is, still a minor and no authority has been cited to us in support of the great extension of the principle "*nemo ex suo delicto meliorem suam conditionem facere potest*," on which the learned District Judge has based his rejection of Gurmukh Singh's claims. For the respondent however it is urged that Gurmukh Singh is disqualified to take the succession for another reason, and that is that he is congenitally lame. It is urged that in the plaint the plaintiff stated that Gurmukh Singh had been lame from birth and that this allegation was not specifically denied by the defendants, but having seen the pleas we find that the paragraph of the plaint referred to was generally denied and it was denied further that Gurmukh Singh was incapacitated according to Hindu Law from taking the succession. It is unnecessary for us to determine whether the lameness, which disqualifies for succession according to Hindu law must be a complete lameness. The provision is one which is repugnant to modern ideas of justice, but such authority as does exist on the subject requires that if lameness does disqualify an heir, it must be congenital. The finding of fact however is that Gurmukh Singh's lameness is not proved to be congenital, and there is a finding which cannot be challenged in second appeal. It is further found that the lameness is by no means complete, for with the assistance of crutches Gurmukh Singh attends school and is consequently not a hopelessly infirm creature. For these reasons we hold that Gurmukh Singh is not debarred by his lameness from taking the succession. It does so happen that he benefits by the murder committed by Uttam Singh, but he was certainly not a party to the murder and that the benefit to Gurmukh Singh was present to the mind of Uttam Singh at the time when he planned and committed the murder, is in the highest degree improbable.

For these reasons we accept the appeal and dismiss the suit with costs throughout.

R.M./R.K.

*Appeal accepted.*



**A. I. R. 1919 Lahore 292 (1)**

CHEVIS, J.

*Waryam Singh and another*—Defendants—Appellants.

v.

*Harnam Singh and another*—Plaintiffs and Defendants—Respondents.

Misc. Second Appeal No. 1524 of 1917, Decided on 29th April 1918, from the order of Dist. Judge, Ludhiana, D/- 10th April 1917.

(a) Civil P. C. (1908), O. 41, R. 23 and O. 43, R. (1) (n)—Chief Court has no power to disturb finding of fact in appeal from order of remand.

In an appeal from an order remanding a case under O. 41, R. 23, the Chief Court can no more go into questions of fact than it can in the case of second appeals. (P 292 C 1)

(b) Punjab Pre-emption Act (1913), S. 15 (c)—Question whether Patti is real sub-division of village is question of fact.

The question whether the patties of a village are real sub-divisions of the village within the meaning of S. 15 (c), secondly of the Punjab Pre-emption Act, is a question of fact. For the decision of that question the Court should have regard only to the fact whether the pattis are actual sub-divisions of the village, and not for what reason the sub-divisions were made. (P 292 C 1,2)

*Devi Dayal*—for Appellants.*Roshan Lal*—for Respondents.

**Judgment.**—Plaintiff's suit to pre-empt based on the ground that he was a proprietor of the patti in which the land is situated, was dismissed by the first Court on a finding that it was not proved that there were any sub-divisions in the village. The first Court held that the pattis were sub-divisions for purposes of revenue only. The District Judge on appeal held that the pattis were real sub-divisions and remanded the case for decision on the merits. The vendees appeal. The appeal is one from an order remanding the case under O. 41, R. 23, and not a second appeal, but I can no more go into questions of fact than I could if this were a second appeal [see *Sawan Singh v. Mothu* (1)]. Now it seems to me that the question whether these pattis are real sub-divisions of the village is a question of fact. In *Nanni Mal v. Sheo Nath* (2) Plowden, J., held without any doubt that it was a matter of fact whether the town or city comprised sub-divisions, and if this is correct in the case of a town, why should it not be so in the case of a village? I certainly cannot say that

there is no evidence to support the finding of the learned District Judge, seeing that the revenue records speak of pattis. As to the argument that the pattis were only created for convenience of collection of revenue. I take it that the real question is simply whether there are actual sub-divisions of the village not for what reason were the sub-divisions made. As I can find no good reason for interfering with what seems to me a finding of fact, I dismiss this appeal. No order as to costs, as I have not gone fully into facts.

R.M./R.K.

*Appeal dismissed.***\* A. I. R. 1919 Lahore 292 (2)**

SHADI LAL AND WILBERFORCE, JJ.

*Mt. Dhan Devi*—Plaintiff—Appellant.

v.

*Gian Chand and another*—Defendants—Respondents.

Second Appeal No. 179 of 1915, Decided on 20th May 1918, from decree of Dist. Judge, Amritsar, D/- 18th November 1914.

\* Hindu Law—Widow—Decree against, after fair contest, in bona fide litigation binds reversioners—Widow must be fairly representing estate and safeguarding its interests.

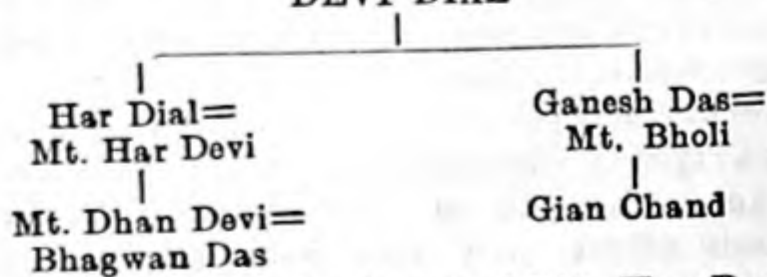
A decree obtained after fair contest in a bona fide litigation against a Hindu widow relating to the estate represented by her binds the reversioners, unless that decree can be impeached on some special ground. (P 293 C 2)

The principle applicable to a case decided after a fair contest in ordinary bona fide litigation applies also to decrees obtained after an award. (P 294 C 1)

In every case however of this description it has to be seen whether the widow is fairly representing the estate and safeguards its interests to the best of her ability and does not act merely or primarily for her personal advantage. In the latter case whether a decree is obtained in ordinary litigation or on a compromise or on an award, reversioners are not bound by her actions. (P 294 C 1)

*Tek Chand*—for Appellant.*Manohar Lal* for *Gian Chand*—for Respondents.**Judgment.**—In this case the pedigree of the parties is as follows:—

DEVI DIAL



Har Dial the husband of Mt. Har Devi and the father of Mt. Dhan Devi, died leaving certain moveable and immov-

(1) A. I. R. 1914 Lah. 328=23 I. C. 817=85 P. R. 1914.

(2) [1987] 64 P. R. 1887.



able property. There was a dispute between his widow, Mt. Har Devi, and his nephew Gian Chand, especially regarding the house. Gian Chand claimed that the house belonged to Har Dial and his brother Ganesh Das as members of a joint Hindu family. He therefore claimed to be the sole heir by survivorship. The matter in dispute was referred to arbitration and the arbitrators found that Har Dial and Ganesh Das had obtained the house by purchase and that their respective heirs were entitled to equal shares. They found that Gian Chand had spent Rs. 750 on the obsequies of Har Dial and that he and Mt. Har Devi were jointly responsible for a debt of Rs. 200. They therefore held that Mt. Har Devi was not entitled to possession of half the house, except on payment of Rs. 850. All the moveables and jewels they awarded to her. The arbitrators held that she must either pay Rs. 850 to Gian Chand for half of the house or that she could cede her rights therein and receive Rs. 400 from him. The arbitrators valued the house at Rs. 2,000. The award was filed in Court and was contested unsuccessfully by Mt. Har Devi and a decree was passed thereon. Now the daughter of Mt. Har Devi has instituted the present suit for a declaration that after the death of her mother half of the house in dispute will be her property and that the award of the arbitrators shall be of no effect as against her. Various pleas were raised which it is unnecessary to mention. It is sufficient to say that the trial Court granted plaintiff a declaration as prayed for. This decision was however modified by the District Judge, who gave the plaintiff a decree allowing her to get possession of half share of the house claimed on payment of Rs. 850. Against this decree both parties appeal.

The main point in the case is how far the daughter is bound by the results of her mother's litigation, and it is first necessary for us to decide the principles of law by which we should be guided. The learned District Judge based his decision on *Khunni Lal v. Gobind Krishna Narain* (1) and Trevelyan's Hindu Law, pp. 475-476. The Subordinate Judge decided the case in favour of the daughter on the authority of *Balakdhar Dube*

*v. Rama Nand Shukul* (2). Many other authorities have been quoted to us by the learned counsel of cases in which an estate represented by a widow has been affected by decrees obtained in litigation or by compromises or awards. As far as decrees obtained after fair contest in a bona fide litigation are concerned there is little dispute before us. The decision of the Privy Council reported as *Katama Natchier v. Rajah of Shivagunga* (3) has been followed by all the High Courts, and by the Punjab Chief Court in *Fatteh Khan v. Baz* (4). It may be regarded therefore as settled law that a decree obtained after fair contest in a bona fide litigation against a widow relating to the estate represented by her binds reversioners unless that decree can be impeached on some special ground. Regarding however decrees obtained against a widow through compromise or the award of arbitrators the rulings of the Courts of this country and the Judicial Committee have been more conflicting. Counsel for the plaintiff-appellant relied on the Privy Council decision reported as *Imrit Konwur v. Roop Narain Singh* (5) that a daughter would not be bound by a compromise effected by a widow under any circumstances.

He also relied on *Balakdhar Dube v. Rama Nand Shukul* (2), in which the widow had agreed to the submission of the dispute to arbitration. He further relied on *Sant Kumar v. Deo Saran* (6) as an authority that the dictum of the Privy Council in *Katama Natchier v. Raja of Shivagunga* (3) did not apply in the case of decrees following a compromise. Many other authorities to the same effect were quoted, for instance, *Ram Sarup v. Ram Dei* (7), *Jeram v. Veerbai* (8), *Shaikh Rafic v. Bhagaban Chandar Dhar* (9) and *Rajlakshmi Dasee v. Katyayani Dasee* (10). The general propositions however laid down in these authorities have been considerably modified by the Privy Council judgment reported as *Khuni Lal v. Gobind Krishna Narain* (1) and another judgment of the

(2) [1912] 14 I. C. 125.

(3) [1861-63] 9 M. I. A. 539 (P.O.).

(4) [1888] 139 P. R. 1888.

(5) [1890] 6 C. L. R. 76 (P.O.)

(6) [1886] 8 All. 365.

(7) [1907] 29 All. 239.

(8) [1903] 5 Bom. L. R. 885.

(9) A. I. R. 1915 Cal. 170=25 I. C. 377.

(10) [1911] 38 Cal. 639=12 I. C. 464.

(1) [1911] 33 All. 356=10 I. C. 477=33 I. A. 87 (P. C.).



same tribunal reported as *Bijoy Gopal Mukerjee v. Krishna Mahishi Debi* (11). These judgments are to the effect that where a compromise has amounted to a bona fide settlement of a family dispute it is binding on the reversioners. The principles therefore laid down by the Privy Council in *Shivagunga's* case (3) have been generally applied to decrees obtained upon a compromise subject to the qualification that the compromise was for the benefit of the estate and not for the personal advantage of the widow. This proposition has been discussed at length in *Shyam Lal v. Rameswari Basu* (12) and the same views are expressed in Trevelyan's Hindu Law, p. 475-476 and Ram Krishna's Hindu Law, Vol. 2, p. 381, et seq.

There only remains for discussion the principle to be applied to decrees obtained against a widow as the result of arbitration proceedings to which she had agreed. There are a few authorities on this subject, but as a general proposition we have no hesitation in agreeing with the dictum of Richards, C. J., in *Balakdhar Dube v. Rama Nand Shukul* (2) that a decree following an award where the arbitration has been regularly and properly held, and where the case has been properly fought out ought to be just as efficacious as where there has been no such submission. In that particular case it was held that where an award was really a compromise and the widow did not properly represent the estate the reversioners were not bound by the decree. As a general rule however we consider that the principles applicable to a case decided after a fair contest in ordinary bona fide litigation would apply to decrees obtained after an award and that under normal circumstances the interests of reversioners would more probably be safeguarded in fair arbitration proceedings than when a widow settles a dispute by compromise.

In every case therefore of this description it has to be seen whether a widow is fairly representing the estate and safeguards its interests to the best of her ability and does not act merely or primarily for her personal advantage. In the latter case whether a decree is obtained in ordinary litigation or on a compromise or on an award, reversioners are not bound by her actions. In the pre-

sent case it is argued that she agreed to make some sacrifice of her interests in the house so as to obtain possession of some moveable property. There is however no support for this argument on the record. The moveable property appears to have been of slight value and the widow appears to have made no sacrifice of the interests of herself or the reversioners in the house. We have described the main circumstances of the dispute in para. 1 of this judgment.

To this description we must however add that when Mt. Har Devi was dissatisfied with the award and objected unsuccessfully to a decree being passed thereon she was represented by her son-in-law Bhagwan Das. From this it is clear that she was acting in concert with her son-in-law and her daughter for the benefit of the estate. We may also remark that about a month after the institution of this suit Mt. Har Devi obtained payment of the Rs. 400 as provided for in the award and this she must also have done with the consent of her son-in-law and daughter who could easily have prevented such an event by obtaining an injunction. We have no doubt therefore that she was representing in good faith the interests of the reversioners. This being the case there is no reason whatever why her daughter should not be bound by the decree which followed the award. In the present case, moreover there is no reason to hold that the arbitration proceedings were in any way irregular or that the case was not properly fought out. We therefore consider that the suit should have been dismissed in toto and accept Gian Chand, defendant's appeal and dismiss the suit against him with costs. Plaintiff's appeal is dismissed with costs payable to Gian Chand.

R.M./R.K. *Appeal dismissed.*

**A. I. R. 1919 Lahore 294**

SCOTT-SMITH, J.

*Sheopat Rai* — Judgment-debtor—Appellant.

v.

*Warak Chand* — Decree-holder—Respondent.

Misc. Second Appeal No. 3285 of 1915, Decided on 30th April 1918, from order of District Judge, Hissar, D/- 25th August 1915.

(11) [1907] 34 Cal. 329=34 I. A. 87 (C.P.).

(12) [1915] 33 I. C. 273.



(a) Civil P. C. (1908), S. 10—Decree contrary to S. 10, is not nullity.

A decree passed contrary to the provisions of S. 10 is not a nullity and cannot be disregarded in execution proceedings. [P 295 C 2]

(b) Civil P. C. (1908), O. 21, R. 7—Executing Court cannot question jurisdiction of Court passing decree—Execution, Decree binding.

Under O 21, R. 7, an executing Court has no power to question the jurisdiction of the Court which passed the decree under execution:

A. I. R. 1914 Bom. 27, Rel. on. [P 295 C 2]

N. C. Pandit—for Appellant.

Mukand Lal Puri—for Respondent.

**Judgment.**—This is an appeal by the judgment-debtor from the order of the lower Court allowing execution of a decree to proceed against him. The decree was an ex parte one passed by a Munsif in District Purnea on 23rd December 1914. The decree was sent for execution to the Munsif of Hissar under the provisions of O. 21, R. 6, Civil P. C.. The judgment-debtor objected to the decree being executed against him on the grounds that it was void and contrary to the provisions of S. 10, Civil P. C. The Munsif however held that it was not open to him to go into the question of the validity of the decree and disallowed the objection. His order having been upheld by the District Judge the judgment debtor has filed a second appeal in this Court, and on his behalf the ruling reported as *Topanram v. Tekchand* (1) is relied upon, wherein it was held that

"a decree passed without jurisdiction is incapable of execution and the Court to which such decree is transferred for execution is competent to decline to execute it. The Court charged with execution of a decree can consider the question whether the Court which passed the decree had jurisdiction to pass it, unless the decree itself precludes that question."

This was a decision of the Judicial Commissioner of Sind and was based upon cases reported as *Haji Musa Haji Ahmed v. Purmanand Nursey* (2) and *Imdad Ali v. Jagan Lal* (3). These were rulings upon S. 225, Civil P. C., which is now represented by O. 21, R. 7 of the present Code. The present Code omits the words "or of the jurisdiction of the Court which passed it" which were in S. 225 of the former Code. The effect of the omission of these words has

been discussed in *Hari Govind Kulkarni v. Narsingrao* (4), wherein it was held "that under O. 21, R. 7, Civil P. C., the executing Court has no power to question the jurisdiction of the Court which passed the decree under execution."

Mr. Nanak Chand on behalf of the appellant admits that this authority is against him, but he questions the correctness of it. He has referred to *Hanuman Prasad v. Muhammad Ishaq* (5) where at p. 141 of the following dictum of their Lordships of the Privy Council in the case of *Khirajmal v. Daim* (6) was quoted:

"Their Lordships agree that the sales cannot be treated as void or now be avoided on the ground of any mere irregularities of procedure in obtaining the decree or in the execution of them. But, on the other hand, the Court had no jurisdiction to sell the property of persons who were not parties to the proceedings, or properly represented on the record."

As against such persons the decree and sales purporting to be made thereunder would be a nullity, and might be disregarded without any proceeding to set them aside. Counsel argues that in this case also the decree passed would be a nullity, and should be disregarded by the executing Court. The cases are, in my opinion, distinguishable. In the Privy Council case the persons whose property was sold in execution were minors who were not properly represented on the record and as against them it was held that the decrees and sales purporting to be made thereunder would be a nullity. In the present case, on the contrary, the defendant was properly represented on the record and the Court had jurisdiction to try the suit. I am not prepared to hold that a decree passed contrary to the provisions of S. 10, Civil P. C., would be a nullity and can be disregarded in execution proceedings. The case in which the decree was passed was tried ex parte and therefore no objection was raised under S. 10, Civil P. C. It would, in my opinion, be anomalous if the defendant, who did not appear during the trial of the suit could raise such an objection for the first time in execution proceedings. I agree with the decision in *Hari Govind Kulkarni v. Narsingrao* (4) above quoted and dismiss the appeal with costs.

R.M./R.K. Appeal dismissed.

(4) A. I. R. 1914 Bom. 27=29 I. O. 123=38 Bom. 194.

(5) [1905] 28 All. 197.

(6) [1905] 32 Cal. 296=32 I. A. 23 (P. O.).

(1) [1912] 5 S. L. R. 260=15 I. O. 882.

(2) [1891] 15 Bom. 216.

(3) [1895] 17 All. 478.



## A. I. R. 1919 Lahore 296 (1)

SHAH DIN, J.

*Uttam Chand*—Plaintiff—Appellant.

v.

*Janji Ram and others*—Defendants—Respondents.

Second Appeal No. 3009 of 1917, Decided on 6th April 1918, from decree of Dist. Judge, Jhang, D/- 4th August 1917.

Registration Act (and 1908), Ss. 17 50—Vendee under subsequent registered deed can eject prior vendee under unregistered deed.

The possession of a vendee who claims title under a sale-deed which for want of registration is inadmissible in evidence is that of a trespasser, and until such possession matures into ownership by prescription, such vendee is liable to be ejected from the property by a subsequent vendee under a registered deed of sale.

[P 296 C 2]

*Oertel, Brij Lal and Devi Dayal*—for Appellant.

*Morton and Anant Ram*—for Respondents.

**Judgment.**—The facts of this case are very fully given in the judgment of the learned District Judge and it is unnecessary for me to repeat them here. The District Judge was inclined to hold that the writing, dated 5th April 1910, contained in Janji Ram's bahi amounted to a written contract of sale of the house in dispute for Rs. 250 and was therefore compulsorily registrable, and being unregistered was inadmissible in evidence. But he did not feel called upon to decide this point finally, as he was of opinion that Janji Ram's possession at the time of the sale on which the plaintiff relied had not been proved to be wrongful and that the plaintiff had failed to show that his title to the house, which was alleged to be derived from the original owner Fattah Sher, was better than that of Janji Ram. Upon that ground alone, the District Judge has dismissed the plaintiff's suit. I am of opinion that the view taken by the District Judge is erroneous and his judgment and decree must be set aside. Janji Ram in his written statement clearly relied upon the sale of the house by Fattah Sher to him on 5th April 1910 for Rs. 250 as the origin of his title to the same that title he is unable to substantiate because the writing embodying the contract of sale on which he relied cannot be admitted in evidence, and no oral evidence can be given by him to prove the alleged sale in his favour. But it does

not follow that because Janji Ram is now in possession of the house, his possession must be presumed to be that of an owner with a title superior to that of the plaintiff to whom the house was admittedly sold in December 1914 by Fattah Sher, who is also admittedly the vendor of Janji Ram. As noted above, Janji Ram's title originated in the alleged sale to him by Fattah Sher in April 1910; the origin of his title being thus definitely known, it cannot be presumed that because he is now in possession of the house it originated otherwise than in the said sale. As he is unable to prove his title because of the non-registration of the writing on which he relies as evidence of the sale in his favour, his possession is clearly that of a trespasser *Mangalasamy Devar v. Subbiah* (1) and *Uttam Singh v. Basanta* (2), and since his possession has lasted for a period of about four years only, it has not matured into ownership by prescription, and he cannot therefore resist the suit of the plaintiff who rightfully claims, as is admitted by the original owner Fattah Sher, under the latter. I accept the appeal and setting aside the judgment and the decree of the District Judge restore that of the Munsif with costs throughout.

R.M./R.K.

*Appeal accepted.*

(1) [1910] 34 Mad. 64=6 I. C. 504.

(2) [1913] 19 I. C. 286.

## A. I. R. 1919 Lahore 296 (2)

LEROSSIGNOL, J.

*Bridges & Co.*—Plaintiffs—Petitioners.

v.

*Shamas Din & Co.*—Defendants—Opposite Party.

Civil Revn. No. 1130 of 1917, Decided on 27th February 1918, from order of Sr. Sub-Judge, Amritsar, D/- 6th October 1917.

(a) Civil P. C. (1908), O. 30, R. 1—Suit against firm—Plaintiff is entitled to know names of persons constituting firm.

Under O. 30, R. 1 a plaintiff suing a firm is entitled to know who the persons are who constitute the firm and the information cannot be withheld. The information is necessary so that the plaintiff may know who will be personally liable in execution for the satisfaction of his decree.

[P 297 C 2]

(b) Civil P. C. (1908), O. 30, R. 6—Individually—Meaning of — Partner cannot be forced to appear in person.

The word "individually" in O. 30, R. 6 is not synonymous with "in person." No partner can be forced under this rule to appear in person, but in his absence after service of summons he



will be dealt with *ex parte*. If however appearance is put in for him, it will be reckoned as his individual appearance. [P 297 C 1]

*Brandon*—for Petitioners.

*Muhammad Husain*—for Opposite Party.

**Judgment.**—The Court below has evidently not understood the law nor its object. Under O. 30, R. 1, a plaintiff suing a firm is entitled to know who the persons are who constitute that firm and the information cannot be withheld. The information is of course necessary so that plaintiff may know who will be personally liable in execution for the satisfaction of his decree. O. 30, R. 6, also has been misconstrued. "Individually" is not synonymous with "in person." No partner can be forced under this rule to appear in person, but in his absence after service of summons, he will be dealt with *ex parte*. If however appearance is put in for him, it will be reckoned as his individual appearance. I accept the petition with costs and direct that plaintiff be supplied with the information he prays for. Pleader's costs Rs. 32.

R.M./R.K. *Petition accepted.*

**A. I. R. 1919 Lahore 297 (1)**

WILBERFORCE, J.

*Amar Ali*—Plaintiff—Petitioner.

v.

*Hasham Ali*—Defendant—Opposite Party.

Civil Revn. Petn. No. 178 of 1917, Decided on 8th January 1919, from decree of the Sub-Judge, 1st Class, Ambala, D/- 25th January 1917.

Civil P. C. (1908), S. 115—Substantial justice done—Although decision erroneous Chief Court will not interfere.

Where substantial justice has been done, the Chief Court will not interfere in revision in spite of an erroneous decision by the lower Courts. 125 P. R. 1907 and 11 I. C. 445, *Foll.*

[P 297 C 1]

*Shah Nawaz*—for Petitioner.

*Shuja-ud-Din for Fazl-i-Hussain*—for Opposite Party.

**Judgment.**—This judgment is in continuation of my order dated 8th July 1918. The Controller of Printing and Stationery has now been examined and cross-examined by interrogatories and has given his opinion in full that the promissory note upon which plaintiff relied and which he stated to have been executed on 1st June 1912 had not been manufactured until after that date. Counsel for the applicant, however still

relies upon *Gunga Ram v. Emperor* (1). In this case it was held that a conviction resting principally upon the evidence of the store keeper in the office of the Superintendent of Stamps, Calcutta, could not be upheld on the ground that such evidence was inadmissible against the accused on the ground that the evidence was based upon public records in possession of the witness which could only be proved by production of the papers themselves or by certified copies. It was further held that the evidence was inconclusive and inherently weak as the witness had not been subjected to cross-examination. The second objection has been removed as the witness was actually cross-examined. The first objection, however, remains, namely, that the evidence of the Controller is totally inadmissible. Counsel, however, for the respondent urges that on revision this Court should not interfere, especially as there is every indication that the judgment of the Lower Court is just and correct. Counsel refers to *Hakim v. Ralya* (2) and *Ghasita v. Sultan* (3) as instances where this Court has refused to exercise its revisional powers in spite of erroneous decisions by lower Courts where substantial justice has resulted. I have no doubt that the decision of the lower appellate Court is correct, as there are many other strong indications to which I need not now make reference that the promissory note was not executed on the date alleged.

I, therefore, refuse to interfere and reject the application with costs.

R.M./R.K. *Application rejected.*

(1) [1903] 5 P. R. 1903 Cr.

(2) [1907] 125 P. R. 1907.

(3) [1911] 93 P. R. 1911=11 I. C. 445.

**A. I. R. 1919 Lahore 297 (2)**

SCOTT-SMITH AND MARTINEAU, JJ.

*Parman*—Petitioner—Appellant.

v.

*Lhassu*—Plaintiff—Respondent.

Civil Misc. Petn. No. 241 of 1918, Decided on 3rd August 1918, from order of Scott-Smith J., D/- 8th April 1918.

(a) Punjab Tenancy Act (16 of 1887), S. 77 (3) (d)—Suit to establish occupancy rights by person other than tenant—Civil Courts have jurisdiction.

A suit by a person, other than a tenant, to establish his claim to a right of occupancy is not one under S. 77, sub-section (3), clause (d) and is, therefore, not excluded from the jurisdiction of the civil Courts. [P 298 C 1]



(b) Punjab Tenancy Act (16 of 1887), S. 43—Tenant ejected under S. 43—Suit for possession and for occupancy rights is maintainable in civil Courts.

A person, who has been dispossessed from his tenancy in accordance with a notice issued under S. 43, Punjab Tenancy Act, and after having instituted a suit to contest his liability to ejectment can sue in the civil Court for possession of the land from which he had been ejected on the ground that he has a right of occupancy therein. [P 298 C 1]

(c) Punjab Tenancy Act (16 of 1887), S. 77 (3)—Jurisdiction—Civil Courts.

Per Martineau, J.—The proviso to sub-S. (3) S. 77, applies where in a suit cognizable by and instituted in a civil Court it becomes necessary to decide any matter in respect of which any suit falling within one of the groups of the subsection might be instituted. [P 298 C 2]

*Fakir Chand*—for Appellant.

*Tek Chand*—for Respondent.

**Scott-Smith, J.**—The facts of this case are given in my order, dated 8th April 1918, in Civil Appeal No. 1429 of 1917. The plaintiff-respondent applied for a review of this order and I directed that it should be heard by a Division Bench as the point to be decided was one of importance and an authoritative decision was necessary. Bakshi Tek Chand raised a preliminary objection to the effect that there was no sufficient ground for review; but we overruled this objection as we considered that the question involved should be fully considered. The question is whether a person, who has been dispossessed from his tenancy in accordance with a notice issued under S. 43, Punjab Tenancy Act, and after having instituted a suit to contest his liability to ejectment, can thereafter sue in the civil Court for possession of the land from which he had been ejected on the ground that he has a right of occupancy therein. The case is exactly on all fours with the one reported as *Kharku v. Dittu* (1). The plaintiff, in order to succeed in his case, has to prove that he has a right of occupancy as alleged by him under S. 8, Tenancy Act; having been dispossessed from his tenancy he is no longer a tenant, and a suit by a person other than a tenant to establish his claim to a right of occupancy is not one under S. 77, sub-S. 3, Cl. (d), Punjab Tenancy Act and is therefore not excluded from the jurisdiction of the civil Courts. In my order disposing of the appeal I gave it as my opinion that the case was one to which the proviso to S. 77 Tenancy Act,

(1) [1893] 70 P. R. 1893.

applied, because the question whether a tenant has a right of occupancy is a matter which can be heard and determined only by a Revenue Court. I am now of opinion that I was mistaken in this view, because I considered the plaintiff to be still a tenant after his dispossession. I am therefore of opinion that the particular matter here in dispute is not one which is excluded from the jurisdiction of the civil Courts and that the proviso does not apply.

I have read the recent Full Bench case No. 36 of 1917 [*Akbar Hussain v. Karm Dad* (2)] decided on 8th April 1918, in which there are certain remarks indicative of the view that an ex tenant can look for no relief outside the Revenue Courts, but the present question was not then before the Court. That was a suit for compensation by a tenant who had been forcibly dispossessed and had within a year recovered possession of his tenancy. The Judges who were parties to that ruling were not at that time considering the case of a tenant who had been dispossessed in due course of law and some of their remarks would appear to go beyond the question which was actually before the Court. I would therefore accept the review and would hold that the suit was rightly tried by the civil Courts, and I would return the case to the Judge in Chambers for decision of the appeal: *Parman v. Ghanthu*. (3) I would further order costs to follow the event.

**Martineau, J.**—I agree that the suit is cognizable by a civil Court.

On the question of the applicability of the proviso to S. 77 (3), Tenancy Act, I was at first disposed to differ from my learned brother, but on a fuller consideration I think that his view is correct. The proviso to sub-S. (3) applies where in a suit cognizable by and instituted in a civil Court it becomes necessary to decide any matter which can under this subsection be heard and determined only by a Revenue Court, that is to say, matter with respect to which any suit falling within one of the groups of the subsection might be instituted. The matter which has to be decided here is whether the plaintiff has a right of occupancy, and a suit instituted by him

(2) [1918] 90 P. R. 1918=48 I. C. 8 (F. B.).

(3) [1919] 50 P. R. 1919=51 I. C. 484.



in respect of this matter would not be one falling within sub S. (3), as he is not now a tenant. The proviso to sub. S. (3), therefore, does not apply in the present case.

I concur in passing the order proposed by my learned brother.

R.M./R.K.

*Review accepted.*

### A. I. R. 1919 Lahore 299 (1)

SHADI LAL AND WILBERFORCE, JJ.

*Nand Singh and others—Defendants—Appellants.*

v.

*Chhajju and others—Plaintiffs—Respondents.*

Second Appeal No. 658 of 1915, Decided on 17th July 1918, from decree of Dist. Judge, Jullundur, D/- 4th December 1914.

Civil P. C. (5 of 1908), S. 100—Question of abandonment is one of fact—Legal principles arising can only be considered.

A finding on the question of abandonment is finding of fact, and only matters of legal principles arising out of such finding can be taken up in second appeal. [P 299 O 1,2]

*Rambhaj Datta Chowdhary—for Appellants.*

*Tek Chand—for Respondents.*

**Judgment.**—One Haria had three sons, of whom Ruldu left his land before the first Settlement. In 1865 he had died leaving two sons, Nihala and Budhu, of whom the former sued his relations for his and his brother's share in the land. He obtained a decree for one-fourth share. It is not clear whether this decree was ever executed or not, the next piece of information available being a revenue entry in 1878 showing him as again out of possession. He subsequently died sonless in Sambat 1960, leaving as his heirs the descendants of his brother Budhu who have now sued the descendants of Haria's other sons for their share in the property, which was joint and remained till 1905 recorded in the names of plaintiffs and defendants. The only questions before the Courts were whether Nihala and Budhu had abandoned their land and whether the present suit is within time. Both Courts have held that no abandonment took place and that the first denial of plaintiffs' title took place in 1905. Against the decision of the lower appellate Court a second appeal has been preferred.

Strictly speaking the findings of the lower Courts on the question of abandon-

ment are findings of fact [*Kirpa v. Jiwa* (1), *Atra v. Ram Kishen* (2) and *Kailas Chandra v. Romesh Chandra* (3)]. On second appeal, therefore only matters of legal principles arising out of these facts can be taken up. In this appeal no matter of legal principle appears to be involved and in these circumstances it is unnecessary for us to discuss the evidence regarding the factum of abandonment. There is also no question of limitation involved as the parties were cosharers in a joint holding and no overt denial of the plaintiff's title took place till 1905 and the suit was instituted within 12 years of this denial. We dismiss the appeal with costs.

R.M./R.K.

*Appeal dismissed.*

(1) [1910] 5 I. C. 840.

(2) [1909] 4 I. C. 965.

(3) [1916] 32 I. C. 355.

### A. I. R. 1919 Lahore 299 (2)

MARTINEAU, J.

*Laiq Ram—Appellant.*

v.

*Thola Singh & another—Respondents.*

Second Appeal No. 101 of 1919, Decided on 3rd March 1919, from decree of Dist. Judge, Ferozepore, D/- 28th October 1918.

Civil P. C. (5 of 1908), O. 21, R. 63—Objection disallowed—Suit by objector—Burden of proof is on plaintiff.

Where an objection to the attachment of certain property in execution is disallowed, it is open to the objector to establish his right by regular suit and the onus in such suit is upon him to prove that the property is his, and that the deed conveying it to him is not collusive or fraudulent. [P 300 O 1,2]

*Shamair Chand—for Appellant.*

*Kureshi—for Respondents.*

**Judgment.**—The defendant Laiq Ram had his house attached in execution of a decree against Ishar Singh. An objection was filed by Ishar Singh's brother-in-law, Thola Singh, in whose favour Ishar Singh had executed a deed of sale in respect of the house four days after Laiq Ram had brought his suit. The executing Court disallowed the objection, holding that the sale was fictitious and that the land was in Ishar Singh's possession at the time of the attachment. Thola Singh then brought the present suit for a declaration that the house was his and was not liable to attachment and sale in execution of Laiq Ram's decree. The first Court dismissed the suit, holding that the good faith of the transaction



between Ishar Singh and the plaintiff had not been proved that the consideration had been paid before the Sub-Registrar only as a show, and that the transfer was fraudulent and, therefore invalid.

On appeal the District Judge, after referring to *Lakhmi Narain v. Tara Singh* (1), *Ishan Chunder Das Sarkar v. Bishu Sirdar* (2), *Mt. Ishar Kuar v. Ram Singh* (3), *Karam Ilahi v. Gulab Rai* (4) and *Bhagwan Das v. Lala Kanshi Ram* (5), has held that where a transfer has been made for valuable consideration and for an adequate consideration, the onus was on the person seeking to avoid the transfer to prove that the transferee was not acting in good faith. Finding that Laiq Ram has not succeeded in proving want of good faith on the part of the plaintiff, the District Judge has accepted the latter's appeal and passed a decree in his favour. Laiq Ram has preferred an appeal to this Court. The appellate Court's view as to the burden of proof might have been correct if there had been no objection to the attachment of the house in the executing Court, but the learned District Judge has failed to notice the fact of such an objection having been made and the legal effect of the order disallowing the objection. O. 21, R. 63, Civil P. C., provides that when a claim or objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but that subject to the result of such suit, if any, the order shall be conclusive.

This makes it clear that the burden of proof is on the plaintiff and there is ample authority to show that such is the case. Counsel for the appellant has referred to *Tulshi Rai v. Ram Das* (6), *Afzal Begam v. Md. Obaidatullah Khan* (7), *Mohima Chunder Koondoo v. Noorooddeen* (8), *Ramnath v. Bindraban* (9), *Govind Atmaram v. Santai* (10) and *Jamahar Kumari Bibi v. Askaran Boid* (11), and these rulings support his con-

tention. For the respondent it is argued that the executing Court ought to have allowed his objection on his showing that Ishar Singh had executed a sale-deed in his favour, that it was not competent to go into the question of good faith and that, therefore O. 21 R. 63, Civil P. C., does not apply. I cannot agree with this argument. What the executing Court had to determine and what it did determine was, whether Ishar Singh had sold the house to the plaintiff or not. In view of the fact that the plaintiff was Ishar Singh's brother-in-law and that the deed had been executed a few days after Laiq Ram had brought his suit, the executing Court had to satisfy itself whether there was a genuine sale, or whether the transaction was a meresham without there being any intention to transfer the ownership of the house from Ishar Singh to the plaintiff. The executing Court went into this matter and after taking evidence came to the conclusion that the sale was fictitious, or in other words, that there was in reality no sale at all. It accordingly dismissed the plaintiff's objection. O. 21, R. 63, clearly applies and the onus is on the plaintiff to prove that the execution of the sale-deed was a genuine transaction, by which it was intended that the ownership of the house should pass to him. He has failed to discharge the onus and the fact of Ishar Singh being still in possession of the house is a strong point against the plaintiff. I accordingly accept the appeal, reverse the decree of the lower appellate Court, and restore that of the first Court dismissing the suit. The plaintiff-respondent will pay appellant's costs throughout.

R.M./R.K.

Appeal accepted.

### A. I. R. 1919 Lahore 300

SCOTT-SMITH AND BROADWAY, JJ.

*Indar Singh*—Accused—Petitioner.

v.

*Emperor*—Opposite Party.

Criminal Revn. No. 976 of 1918, Decided on 18th October 1918, from the order of District Magistrate, Kangra, D/- 1st July 1918.

Criminal P. C. (1898), S. 197. — Offence committed by Magistrate Second Class—District Magistrate can grant sanction for prosecution under S. 197 — Practice, Subordinate Courts.

"Where an offence is committed by a Magistrate of Second Class, sanction for his prosecution

- (1) [1901] 6 P. R. 1901.
- (2) [1897] 24 Cal. 825.
- (3) [1911] 9 I. C. 1018.
- (4) [1916] 39 P. R. 1916=33 I. C. 960.
- (5) A. I. R. 1914 Lah. 356=25 I. C. 180.
- (6) [1887] A. W. N. (1887) 71.
- (7) [1899] A. W. N. (1899) 220.
- (8) [1869] 11 W. R. 422.
- (9) [1896] 18 All. 369.
- (10) [1888] 12 Bom. 270.
- (11) [1915] 30 I. C. 855.



can, under S. 197 be given by the District Magistrate to whom he is subordinate and whose power to give such sanction is not limited by the Local Government.

The accused, a Tahsildar and Magistrate of the Second Class, while inquiring into a complaint, lost his temper with a person whom he suspected of prompting a witness and gave him a beating with a stick. He was convicted by the District Magistrate of an offence under S. 323, I. P. C. On revision to the Chief Court the Judge, before whom the application came on for hearing, set aside the conviction on the ground that no sanction had been granted for the prosecution of the petitioner under S. 197 and remarked that the accused could not be prosecuted without the previous sanction of the Local Government. On the matter again coming before the District Magistrate the latter granted sanction for the prosecution of the petitioner under S. 197 (1):

*Held:* (1) that the dictum of the Judge that the sanction of the Local Government was necessary for the prosecution of the accused was erroneous and that the District Magistrate was not bound by it;

(2) that under S. 197 (1), District Magistrate, had power to sanction the prosecution of the accused. [P 302 Ct]

*Muhammad Shafi*—for Petitioner.

*C. Bevan Petman*—for the Crown.

**Judgment.**—The facts out of which the present application for revision arises are as follows:—The petitioner, who is a Tahsildar and a Magistrate of the Second Class in the Kangra District, was convicted by the District Magistrate of an offence under S. 323, I. P. C., and sentenced to Rs. 30 fine, the charge against him being that while inquiring into a complaint under the Criminal Procedure Code, he lost his temper with a person whom he suspected of prompting a witness and gave him a beating with a stick. An application for revision to the Sessions Judge of Hoshiarpur was rejected, it being held inter alia that no sanction for the prosecution of the Tahsildar was necessary under S. 197, Criminal P. C., as he was not an officer who was not removable from his office without the previous sanction of the Local Government. The petitioner having applied to this Court on the revision side (Criminal Revision No. 65 of 1918), Wilberforce, J., held that sanction for the prosecution was required under S. 197, Criminal P. C., and that therefore the proceedings of the District Magistrate were bad for want of jurisdiction. Those proceedings were, therefore quashed and the petitioner was discharged. The Judge not only held that sanction was required for the initiation of the proceedings, but also that as the Tahsildar was acting as a Judge within

the meaning of S. 197, Criminal P. C., at the time when the offence was said to have been committed, no Court could take cognizance of the offence without the previous sanction of the Local Government. After this order the matter was again before the District Magistrate, who passed the following order:

"Under S. 197 (1), Criminal P. C., I sanction the prosecution of Indar Singh, in that he, while acting as Tahsildar of Kangra and exercising the powers of a Second Class Magistrate in the Kangra District and being subordinate to this Court, whose power to give such sanction the Local Government has not limited, did at Tika Chatari, during a magisterial inquiry on or about 7th September 1917, lost his temper with a person named Hukam Ohand and did give him a severe beating with a stick."

The present application has been filed to have this sanction set aside on the revision side and we have heard Mr. Shafi on behalf of the petitioner and the learned Government Advocate on behalf of the Crown. Mr. Shafi contends that it once having been held by this Court, namely, by Wilberforce, J., that the Tahsildar could not be prosecuted without the sanction of the Local Government, the matter is concluded and that his order cannot be revised by this Bench. He has quoted *Hale v. Emperor* (1), *Press v. Emperor* (2), *Queen-Empress v. Fox* (3), and *Gibbons, In the matter of the petition of* (4) and other rulings in support of the proposition that a High Court has no power to revise either on appeal or revision a judgment of a Single Judge exercising criminal jurisdiction. The learned Government Advocate says he has no quarrel with these authorities, but he contends that the present proceedings are distinct from those which were quashed by Wilberforce, J. His contention is that the previous proceedings were certainly ultra vires because no sanction had been given under S. 197, Criminal P. C., but he contends that the dictum of the Judge, that the sanction of the Local Government was necessary, was erroneous, and that in considering the present application we are not bound by the reasons given for the decision of the previous application. It is a fact that the previous proceedings were initiated without sanction of any sort being

(1) [1909] 1 P. R. 1909 Cr. = 1 I. O. 506 = 9 Cr. L. J. 806.

(2) [1909] 4 P. R. 1909 Cr. = 1 I. O. 747 = 9 Cr. L. J. 878.

(3) [1886] 10 B. & M. 176 (F. B.)

(4) [1887] 14 Cal. 42.



given under S. 197, Criminal P. C., and therefore it is quite obvious that those proceedings were without jurisdiction. There is no doubt that the Tahsildar was a Judge within the meaning of S. 197, Criminal P. C.: see the definition of the word in S. 19, I. P. C. In our opinion S. 197, Criminal P. C., was misread by the Judge who decided the previous application, because the word "Judge" in S. 197 is not qualified by the words "not removable from his office, etc.," as the position of the comma shows. In the case of an offence committed by a Judge, to which S. 197, would apply, we would read the section as follows:

"When any Judge . . . . is accused as such Judge . . . . of any offence, no Court shall take cognizance of such offence, except with the previous sanction . . . . of some Court . . . . to which such Judge . . . . is subordinate, and whose power to give such sanction has not been limited by such Government."

All that was necessary then in the present case was that the sanction of some Court, to which the Tahsildar was subordinate, and whose power to give such sanction had not been limited by the Local Government, should be given. This sanction has now been given by the District Magistrate to whom the Tahsildar is certainly subordinate, and indeed it has not been contended by Mr. Shafi that the present sanction is insufficient for the purposes of the section. We therefore hold that the present proceedings are in order and the sanction has been lawfully given. To sum up we agree with the decision of Wilberforce, J., that the previous proceedings were ultra vires for want of sanction and therefore they had to be quashed, though we do not agree with him that the sanction necessary for the initiation of the proceedings was that of the Local Government. We hold that all that was necessary was that the sanction of some Court to whom the Tahsildar was subordinate should be given. Now that the sanction of the District Magistrate has been given, the proceedings are perfectly legal. The application for revision is therefore rejected.

R.M./R.K.

*Petition rejected.***A. I. R. 1919 Lahore 302**

RATTIGAN, C. J.

Singer Manufacturing Co. Lahore—  
Plaintiff—Petitioner.

v.

Niaz Ali and another—Defendants—  
Opposite Parties.

Civil Revn. Petn. No. 68 of 1915, Decided on 28th June 1918, from decree of Small Cause Court Judge, Lahore, D/- 27th August 1914.

(a) Contract—Hire-Purchase — Hirer failing to pay rent as agreed—Owner can recover full amount from hirer or guarantor—Vendee from hirer does not acquire good title.

Plaintiff sued to recover certain sums from the defendants on the basis of contracts entered into by the latter, some as principal debtors and some as guarantors respectively. The operative portions of the contracts were as follows: (i) the plaintiff company agreed to let to the hirer a sewing machine with accessories for which the hirer having paid Rs. 20 as the first month's rent in advance, agreed to pay the owner Rs. 5 regularly every month in advance; (ii) on failure of the hirer to perform the agreement the owner could re-take possession of the machine; (iii) the hirer could at any time during the hire become the purchaser of the machine by payment in cash of the price endorsed on the agreement; (iv) the "guarantor" agreed to guarantee the due payment of any sum of money which might become payable to the owner under the agreement. It appeared that the hirer sold the machine to one P., who sold it to F., from whom the plaintiff also sought to recover its possession:

*Held:* (1) that the contracts were contracts of hiring and letting and did not amount to sales and the plaintiff was entitled to recover from the hirer and guarantor jointly and severally the full amount which the hirer had agreed to pay for the monthly hire of the machine; [P 303 C 2]

(2) that the defendant F., acquired no good title to the machine which he obtained at a time when his alienor was still merely a hirer of it and had not exercised the option of purchasing it from the plaintiff company: *Helby v. Matthews*, (1895) A. C. 471 and 6 Bom. L. R. 871, *Foll.*

[P 304 C 1]

(b) Contract Act (1872), S. 108, Excep. 1—  
Applicability.

Section 108, Excep. 1, does not apply where there is only a qualified possession such as a hirer of goods has: 12 B. L. R. 42, *Foll.*

[P 304 C 1]

Obedulla and Sewa Ram Singh—for  
Petitioner.

**Judgment.**—In this case and in Civil Revisions Nos. 70 and 71 of 1915 petitioner. The Singer Manufacturing Company, sued to recover certain sums from the defendants on the basis of contracts entered into by the latter, some as principal debtors and some as "guarantors" respectively. The contracts in question are printed in English, Urdu and Hindi and are to the following effect:



That the owner, i. e., The Singer Manufacturing Company, agrees to let to the hirer the sewing machine and accessories described by endorsement on the back of the agreement; that the hirer having paid the sum of Rs. 20 as the first month's rent in advance agrees to pay the owner a sum of Rs. 5 regularly every month in advance; to keep the machine and accessories in good order and in his own custody at his address and not to remove them without the owner's consent or to sell or to pawn them; that on the failure of the hirer to perform the agreement, the owner may terminate the hiring and re-take possession of the machine and accessories; that on the termination of the hiring the machine, etc., shall be returned to the owner, that the owner's right of lien on the machine shall not be destroyed by any money-decree or judgment that the owner may obtain against the hirer or the guarantor or both and finally that if the hirer fails to pay regularly in advance, the whole transaction shall be treated as one of hire without any option of purchase. On the other hand the owner agrees that the hirer may terminate the agreement by delivering up the machine and accessories in good order to the owner and that the hirer may at any time during the hire, become the purchaser of the machine and accessories by payments in cash of the price endorsed on the agreement provided the payments of hire are regularly and duly made.

Lastly, the "guarantor" agrees in consideration of the foregoing to guarantee the due payment of any sum or sums of money which may become payable to the owner under the agreement. In Civil Revision No. 70 of 1915 the company, in addition to suing the hirer and the guarantor, also sued a third person, one Fazl Karim, for recovery of the machine on the allegation that the hirer Rahmat Ullah had sold the machine unlawfully to Piyare Lal and that Piyare Lal had sold it in turn to Fazl Karim. The Judge, Small Cause Court, has by a process of somewhat subtle reasoning held that these contracts which on their face appear to be contracts of hiring and letting are in reality transactions of sale or, as the learned Judge expresses it:

"under the hidden words of the agreement is a contract not visible at the outset to which no obligee would consent."

Upon the view taken by him he has granted plaintiff a decree for the balance of money due from the hirers up to the amount of Rs. 87, that being the price of the machine as endorsed on the agreement. He has further dismissed the suit as against Fazl Karim on the ground that Rahmat Ullah became the owner of the machine under the terms of the contract and was therefore competent to sell it to Fazl Karim. In all the cases it is not denied that the so called rent for the machines was not paid regularly in accordance with the terms of the contract. The question whether contracts of this kind are contracts of hiring and letting with an option of sale or are transactions of sale has been authoritatively settled by the decision of the House of Lords in the well-known case of *Helby v. Matthews* (1), and this very contract has come before the Bombay High Court for consideration and been treated as one of hiring and letting: see *Gopal Tukaram v. Sorabji Nusserwanji* (2). I have no hesitation therefore in holding that the contracts are of hire and do not amount to sales. The question then arises whether the plaintiff is entitled to claim the full amount due under the terms of each contract for the monthly hire of the machines. The value of these machines is Rs. 87, but that appears to me to be no reason why plaintiff should not be entitled to recover the full amount which the defendant has agreed to pay for the monthly hire of the particular machine. If he has kept it and used it for a long period but has failed to comply with the terms of his contract and to pay the hire regularly in advance, he is legally liable to fulfil the terms of his contract. There is no question here of compensation for the breach of a contract within the meaning and for the purpose of Ss. 73 and 74, Contract Act, and the amount which is claimed from the defendant is the amount due from him under the express and specific terms of his undertaking. I therefore hold that plaintiff company is in each case entitled to the decree for which it prays against the hirer and the guarantor jointly and severally.

As regards the claim against Fazl Karim Civil Revision No. 70 of 1915, Mr. Ghulam Rasul on behalf of that defendant

(1) [1895] A. O. 471.

(2) [1904] 6 Bom. L. R. 871.



denies that the machine in his possession was the machine which Rahmat Ullah obtained from the plaintiff company. There is no definite evidence upon the record as it stands; to prove this fact, but for this omission plaintiff company is hardly to blame, inasmuch as Fazl Karim did not appear in the lower Court. Assuming however for the present that the machine is the same, I am of opinion that Fazl Karim acquired no good title to the machine which he obtained at a time when Rahmat Ullah was still merely the hirer of it and had not exercised the option of purchasing it from the plaintiff company: see *Helby v. Matthews* (1). S. 108, Excep. 1, Contract Act would not help Fazl Karim, inasmuch as that exception does not apply where there is only a qualified possession such as a hirer of goods has: see *Greenwood and Co. v. Holqutte* (3). But before a final decision can be given with regard to Fazl Karim's liability, an inquiry must be made whether the machine in his possession is the same that was hired by Rahmat Ullah and for this purpose I shall have to remand this petition for final disposal to the Judge, Small Cause Court. I might here remark that the plaintiff company do not wish to press their claims against Rahmat Ullah and his guarantor for the reasons given by Mr. Obedullah in Civil Revision No. 11 of 1915. The result then is that I accept the petitions for revision in Cases Nos. 68 and 71 and grant plaintiff a decree for the full amount claimed against the respective defendants jointly and severally, and that as regards Civil Revision No. 70 of 1915, I remand the case to the Judge, Small Cause Court for inquiry and disposal upon the point above stated. I make no order as to costs.

R.M./R.K. *Order accordingly.*

(3) [1873] 12 B. L. R. 42=20 W. R. 467.

### A. I. R. 1919 Lahore 304

MARTINEAU, J.

*Muharram Ali Chishti*—Defendant—Appellant.

v.

*Bansi Lal and another*—Plaintiffs and Defendant—Respondents.

Second Appeal No. 441 of 1917, Decided on 11th June 1918, from decision of Dist. Judge, Lahore D/- 8th November 1916.

**Hindu Law—Joint family—Notice to quit given by lessor (one member of family)—Notice is valid—Payment of rent by subtenant to lessor—Subtenant is liable to pay arrears due—Lease for eleven months—Tenant holding over—Tenancy is monthly tenancy—Notice of 15 days to quit or to pay enhanced rent—Notice is valid—Transfer of Property Act (1882), Ss. 106 and 116.**

A house belonging to one H. a Hindu was leased by his son B. to defendant 1 on 20th October 1904 for eleven months. Defendant 1 sub-let the house to defendant 2 and on 13th March 1915 a notice was sent on behalf of B and his brother G. to defendant 2 asking him to vacate the house by 1st April, and stating that if he failed to do so he would be charged rent at an enhanced rate. The house not being vacated B. and G. brought a suit for ejectment and arrears of rent, their sons being afterwards added as plaintiffs.

*Held:* (1) that B. being the sole lessor of the house it was not necessary for his sons to join in the notice of ejectment; (2) that even if it could be said that the sons of B. and G. were co-parceners with their fathers still B. and G. were competent as leading members of the family to give the notice of ejectment especially as the sons with the exception of one were all minors; (3) that the addition of a clause informing the defendant that if he did not vacate the house by the date mentioned he would have to pay enhanced rent did not alter the fact that the notice was a notice to quit; (4) that the lease being for eleven months only on the expiry of that term the tenancy became a monthly tenancy and the notice given was therefore sufficient and (5) that the defendant 2 having recognized the plaintiffs as his landlords by paying rent to them he was liable for the rent due to them. [P 305 C 1, 2]

*Tek Chand*—for Appellant.

*Gokul Chand Narang*—for Respondents.

**Judgment.**—A house belonging to Diwan Hari Singh was leased by his son Diwan Bansi Lal on 20th October 1904 to Fakir Said-ud-din defendant 1, for eleven months at Rs. 18 a month. Defendant 1 sublet the house to Muharram Ali Chishti, defendant 2. On 13th March 1915 a notice was sent on behalf of Bansi Lal and his brother Gopal Lal to defendant 2, asking him to vacate the house by 1st April 1915, and stating that if he failed to do so he would be charged rent at the rate of Rs. 36 a month. The house not being vacated, Bansi Lal and Gopal Lal brought the present suit for ejectment and arrears of rent. Their sons were afterwards added as plaintiffs.

The first Court held that the notice to quit was not a valid notice, that the suit was bad for misjoinder of causes of action because it included a claim for compensation for unlawful occupation of the pre-



mises after the date mentioned in the notice and such a claim could not in addition to the claim for rent, be joined with one for possession of the house and that the plaintiffs were not entitled to recover rent from defendant 2 with whom there was no privity of contract. It accordingly dismissed the suit. On appeal the District Judge remanded the case for decision on the merits holding that the notice was valid; that although the plaintiffs could not include in one suit a claim for ejectment for arrears of rent and for enhanced rent after the date of the notice the suit was not liable to be dismissed on that account and that the plaintiffs are entitled to recover rent from defendant 2.

The latter appeals from the order of remand. The first contention is that the notice sent to the appellant on 13th March 1915 ought to have been given by all the plaintiffs, as it is urged that they are members of a joint Hindu family and became the owners of the house after the death of Hari Singh, and as the notice was sent by Bansilal and Gopal Lal only it is not a valid notice. Various rulings have been cited to the effect that where there are several joint lessors the lessee can only be ejected at the instance of all. I agree with the learned District Judge that the rulings relied upon are not applicable to the present case since Bansilal was the sole lessor. He may have given the lease on behalf of his father to whom the house belonged but this would not make it necessary for all the members of the family to join in giving the notice. The true joint Hindu family of the Mitakshara is almost unknown in the Punjab [see *Rupchand v. Basanta Mal* (1)], and after the death of Hari Singh his sons Bansilal and Gopal Lal would become the owners of the house. Even if it be said that the sons of Bansilal and Gopal Lal were co-parceners with their fathers still Bansilal and Gopal Lal would be competent as the leading members of the family to give the notice of ejectment especially as the sons are, with the exception of one, all minors. The next contention is that the notice was not a clear notice to quit as required by law. I cannot agree with the contention. The notice asks the appellant to vacate by 1st April 1915. This is perfectly clear and the addition of a

clause informing the appellant that if he did not vacate by the date mentioned he would have to pay an enhanced rent does not alter the fact that the notice was a notice to quit by the 1st April. The rulings *Bradley v. Atkinson* (2) and *Shakhi Chand v. Ram Chandra Marwari* (3), cited on behalf of the appellant are not in point.

The third contention is that the tenancy was for periods of eleven months running one after another and that therefore the notice given on 13th March to vacate by the 1st April was insufficient. This contention is also wrong. The lease was for eleven months only. On the expiry of that term the tenancy became a monthly tenancy, in accordance with S. 116, T. P. Act. I agree with the learned District Judge that the notice given was sufficient and that it was a valid notice. Lastly it is argued that the claim for rent against the appellant is not maintainable because there was no privity of contract between him and the plaintiffs, and *Abdul Kadir v. Nur-ud-Din* (4) is cited in support of this argument. But as pointed out by the lower appellate Court the appellant has himself recognized the plaintiffs as his landlords and has been paying them the rent. I agree therefore with that Court that the present case is distinguishable from the ruling relied upon and that the appellant is liable for the rent due to the plaintiffs. Nothing has been said in support of grounds of 7 and 8 of appeal. The lower appellate Court's decision is correct and I dismiss the appeal with costs.

R.M./R.K. *Appeal dismissed.*

(2) [1885] 7 All. 596.

(3) [1912] 15 I. C. 906.

(4) [1898] 14 P. R. 1898.

### A. I. R. 1919 Lahore 305

SHADI LAL AND MARTINEAU, JJ.

*Punjab Co-operative Bank, Ltd., In re*  
—Petitioners.

Miso. Original Case No. 7 of 1918, Decided on 10th January 1919.

(a) Companies Act (1913), Ss. 173 and 215  
—Voluntary winding-up—Court has power to stay proceedings.

The power to make an order for the stay of proceedings under a voluntary winding-up has been given to the Courts in India by S. 215, read with S. 173. [P 306 C 2]

(b) Companies Act (1913), Ss. 173 and 215  
—Application for stay of proceedings in voluntary liquidation—Court has to see whether

(1) [1889] 102 P. R. 1889.



stay will be conducive or detrimental to commercial morality and to interests of public.

In dealing with an application for stay of proceedings in voluntary liquidation of a certain company the Court has to see whether a stay of the proceedings will be conducive or detrimental to commercial morality and to the interests of the public at large: *In re Telescriptor Syndicate, Ltd.* (1903) 2 Ch. 174, *Foll.* [P 306 C 2]

On an application being made for an order staying proceedings in regard to the winding-up of the Punjab Co-operative Bank which was in voluntary liquidation, some share-holders of the Bank opposed the application:

*Held:* that having regard to the fact that the company was in a solvent condition and that the resolution for the company to be wound up was passed with a view to the Bank being restarted after the claims of the creditors had been satisfied, proceedings should be stayed subject to the condition that all share-holders should be given the option of retiring from the company or continuing to be its members. [P 307 C 1]

*L. Puri, Gobind Das and S. K. Mukerji*—for Petitioner.

*Kotu Mal*—for Opposite Party.

**Order.**—This is an application by Lala Mulk Raj, one of the liquidators and contributories of the Punjab Co-operative Bank, Limited, which is in voluntary liquidation, for an order to be passed staying further proceedings in regard to the winding-up of the company, and granting permission to restart business. The application sets fourth that although the company successfully weathered the banking crisis that followed the failure of the People's Bank of India in September 1913, it was eventually obliged to suspend payment after about 75 per cent of its deposits had been withdrawn; that at an extraordinary general meeting of the share-holders held on 11th October 1914 a resolution was passed that the company be wound up voluntarily; that it was also resolved that as the Bank had ample resources in its investments and was being wound up merely for want of cash the liquidators should, with a view to restarting the Bank (after the satisfaction of all claims of creditors), place a scheme of liquidation before the share-holders; that during the pendency of the liquidation creditors to the value of some 16 lakhs have been paid not only 16 annas in the rupee, but interest also in full up to date of payment; that the assets of the company now stand at twice the amount of paid up capital owing to accumulation of reserves and rests; that at present the total amount due to creditors is only Rs. 81,000 against which the company has in hand a cash balance of Rs. 1,13,000;

that the company is both able and willing to pay the remaining creditors in full with interest up to date, but the amount has not been drawn in spite of several requests and reminders; and that at an extraordinary general meeting of the share-holders held on 25th May 1918 resolutions were unanimously adopted relieving the old liquidators of their duties and appointing in their stead the Directors of the company as liquidators, with a direction to them to take steps to restart the Bank.

Under the English Companies Act the Court has power to make an order for the stay of proceedings under a voluntary winding-up, as has been held in *In re Steamship "Titian" Co.* (1) and *In re Schanschieff Electric Battery Syndicate, Ltd.* (2), and we are of opinion that the same power is given to the Courts in India by S. 215, read with S. 173, Act 7 of 1913, these sections containing provisions identical with the provisions of Ss. 193 and 144, respectively of the English Companies (Consolidation) Act of 1908. We have to consider whether it would be proper to make the order prayed for. The principles to be followed in dealing with such applications are laid down in *In re Telescriptor Syndicate, Ltd.* (3). The Court has to see whether a stay of the proceedings will be conducive or detrimental to commercial morality and to the interests of the public at large. In the cases reported as *In re Steamship "Titian" Co.* (1) and *In re Schanschieff Electric Battery Syndicate, Ltd.* (2), cited above, there was no opposition to the application. In the case of *In re South Barrule Slate Quarry Co.* (4), there was one dissentient, and he was given the option of retiring from the company, the petitioner to pay him the value of his shares in the event of his electing to retire. *In re Steamship Chigwell Co., Ltd.* (5) was case in which a company had gone into voluntary liquidation with a view to the formation of another company. The latter company was however not formed and it was accordingly proposed to stay the winding-up proceedings and resume the business of the company.

(1) [1888] W. N. 17.

(2) [1888] W. N. 166.

(3) [1903] 2 Ch. 174.

(4) [1869] 3 Eq. 688.

(5) [1888] 4 T. L. R. 308.



There were three dissentients. The Court passed an order similar to that passed in *In re South Barrule Slate Quarry Co.* (4). In the present case one of the shareholders, Pandit Kotu Mal, has appeared before the Court and opposed the application. Many other shareholders have also sent applications by post, in which they object to the stay of the winding-up proceedings and to the re-starting of business by the Bank. Kotu Mal has filed an affidavit making allegations as to the working of the company and the conduct of the liquidators, and the petitioner has filed a counter-affidavit replying to the allegations in detail. We may note that the matters stated in para. 19, counter-affidavit are irrelevant. We express no opinion as to the correctness or incorrectness of the allegations made by Kotu Mal, and are not in a position to form an opinion without an inquiry into the affairs of the Bank. Kotu Mal asks in his affidavit that an inquiry may be made, but such an inquiry, which might have been practicable if the liquidation had been an official one, would be a matter of great difficulty where the liquidation has been voluntary. Having regard to the facts that the company is apparently in a solvent condition, and that the resolution of 11th October 1914 for the company to be wound up was passed with a view to the Bank being re-started, after the claims of creditors had been satisfied, we think that the application should be granted, but as the dissentient shareholders cannot be compelled to continue as members they must be given the option of retiring, as was done in the case of *In re South Barrule Slate Quarry Co.* (4). The difficulty will be, as the liquidation has not been conducted by the Court, to determine the values of the interests of shareholders electing to retire, and counsel have not been able to suggest how this is to be done.

The only possible method appears to be to divide the net assets of the company (which will be the face value of the assets minus the amount of the debts to be paid) by the paid up capital, and multiply by the amount paid by the shareholder in respect of his shares. This appears to be a fair method. The petitioner states that the debts to be recovered are all fully secured and that the debtors are men of substance, so that no allowance has to be made for bad debts.

Although all the assets cannot be realised at once, the debtors will have to pay interest for the period during which the debts remain unpaid. It will be necessary to inquire from all the share holders whether they elect to remain or to retire, as the shareholders live in different places and there may be dissentients besides those from whom letters objecting to the stay of the winding-up proceedings had been received. We grant the application for stay of the proceedings relating to the winding-up of the company, subject to the condition that all the shareholders are given the option of retiring from the company or continuing to be members. Each share holder individually must be asked by letter which alternative he will choose, and he must make his election in writing. Those who elect to retire may do so on receiving the values of their interests in the company ascertained in the manner indicated above. Their claims should be satisfied within six months, and after they have been satisfied the company may resume business.

R.M./R.K. *Application granted.*

### A. I. R. 1919 Lahore 307

SHAH DIN, J.

*Beli Ram and another*—Plaintiffs — Appellants.

v.

*Umarbakhsh and others*—Defendants — Respondents.

Second Appeal No. 867 of 1917, Decided on 25th April 1918, from decree of Sr. Sub-Judge, Gujranwala, D/- 27th November 1916.

**Custom (Punjab) — Village community — House in abadi occupied by kamin — Collaterals are entitled to succeed.**

Under the ordinary village custom a near collateral of a deceased kamin is entitled to retain possession of a house in the village abadi which was occupied by the deceased. [P 308 C 1]

*Kharak Singh*—for Appellants.

*Taj-ud-din*—for Respondents.

**Judgment.**—I have not thought it necessary to call upon the counsel for the respondents in this case, as after hearing the appellants' pleader I think that the decree passed by the Senior Subordinate Judge, Gujranwala, which is under appeal is correct and must be maintained. The Senior Subordinate Judge has held, on the authority of a recent decision of this Court, reported as *Kala v. Hasham* (1).

(1) [1916] 35 I. C. 291.



that the respondent Umar Bakhsh, being a near collateral of Ahmad Din, deceased, who had been in possession of the house in dispute as a kamin under the appellants, is entitled to retain possession of the same under the ordinary village custom applicable to such cases. Ahmad Din left a widow Mt. Budhi, who resided in the house for about a year and then abandoned it. It is argued that there is no definite finding by the Senior Subordinate Judge that Mt. Budhi had abandoned the house as held by the Munsif. But on the appellants' own showing Mt. Budhi has left the house, for otherwise they had no right to bring the present suit for possession, and it is clear that the fact of the abandonment of the house by Mt. Budhi was not disputed before the Subordinate Judge. It is next argued that since Umar Bakhsh is not a near collateral of Ahmad Din, he has no right to succeed to the house in suit. But admittedly Umar Bakhsh is uncle of Ahmad Din, and as such he is his near collateral. This argument is untenable on the face of it and hardly deserves refutation. It is further contended that the appellants are not ordinary agricultural proprietors in the village who gave a site in the abadi to a kamin to build upon under circumstances which would entitle the kamin and his collaterals to have a right of residence in the house. But this point was not taken in the lower Courts and no issue was framed regarding it. I cannot therefore allow it to be raised at this stage of the proceedings. Lastly, it is urged that since the respondents pleaded that they were full owners of the house and not village kamins having only a right of residence therein in succession to Ahmad Din, the Senior Subordinate Judge, having found that the respondents' alleged ownership was not established, should have decreed the appellants' claim. But as pointed out by the Subordinate Judge, the plea of permanent right of residence could be raised in the alternative by the respondents and was so raised by them; and upon that point, the finding being in their favour, the suit of the appellants was rightly dismissed. The appeal fails and is dismissed with costs.

R.M./R.K.

*Appeal dismissed.***A. I. R. 1919 Lahore 308**

BROADWAY, J.

*Rahman and others—Plaintiffs—Petitioners.*

v.

*Mt. Ganeshi—Defendant—Opposite Party.*

Civil Revn. Petn. No. 597 of 1918, Decided on 28th January 1919, against order of Senior, Sub-Judge, First Class, Julundur D/- 22nd June 1918.

Civil P. C. (1908), S. 115—High Court may interfere in exceptional cases in order to avoid irreparable damage or for other pressing cause.

As a general rule it is only in cases in which no appeal lies that the High Court will interfere on the revision side although in exceptional cases it may consider it necessary to interfere in order to avoid irreparable damage or for some other pressing cause: 11 I. C. 840, *Foll.*

Several plaintiffs jointly brought a suit against the defendants for declaration of a certain right. On the objection of the defendants the Court returned the plaint for amendment directing the plaintiff to bring separate suits. The plaintiffs therefore filed a petition of revision in the Chief Court:

*Held*: (1) that inasmuch as the plaintiffs were not joint owners of the land in connexion with which they sought a declaration and inasmuch as they based their cause of action primarily on the action taken in connexion with their rights by the defendants, the order complained of could not be said to be improper or passed in an improper use of the discretionary powers of the Court;

(2) that there was no sufficient cause for the exercise of the Court's power of revision as no irreparable damage was likely to be caused to the plaintiffs by the order in question. [P 309 C 1]

*Jagan Nath—for Petitioners.**Tek Chand—for Opposite Party*

**Judgment.**—Some eighty persons joined together to institute a case against some thirty-two defendants, all but five of whom were merely pro forma defendants. The suit was for a declaration of certain rights that the plaintiffs claimed to possess jointly with the pro forma defendants. The five contesting defendants raised an objection to the effect that the plaintiffs should be directed to bring separate suits as they had been wrongly joined. The learned Subordinate Judge held that this objection was valid and has directed the plaintiffs to bring separate suits if they wished. Against this order the original plaintiffs have preferred this revision through Mr. Jagan Nath and I have heard Mr. Tek Chand for the contesting defendants.

In *Bibi Chando v. Jowala Pershad* (1) it was held by a Division Bench of this

(1) [1911] 11 I. C. 840.



Court that as a general rule it is only in cases in which no appeal lies that this Court would interfere on the revision side although in exceptional cases it may consider it necessary to interfere in order to avoid irreparable damage or for some other pressing cause. Mr. Tek Chand has drawn my attention to this decision and has contended that it is open to the plaintiffs to disobey the order of the Court, which naturally would result in the rejection of their plaint when they can get the matter decided in a regular appeal. He also contended that there was nothing exceptional in this case which would justify this Court interfering with an interlocutory order of this nature on the revision side. Mr. Jagan Nath has drawn my attention to *Ramendra Nath Ray v. Brojendra Nath Dass* (2), *Girijanath Ray v. Surendra Nath Ray* (3), *Lal Chand v. Mt. Manohri* (4), *Mahadeo v. Nago* (5) and *Alah Bakhsh v. Sadiq Ali* (6) and has contended that in many cases several plaintiffs have been allowed to join in bringing a suit. There is no necessity to discuss the various rulings cited by Mr. Jagan Nath, as no doubt instances occur which justify such a joinder of parties as is referred to in the said rulings. In the present case the plaintiffs are not joint owners of the land in connexion with which they seek a declaration of certain rights. They base their cause of action primarily on the action taken in connexion with these rights by the contesting defendants; and in these circumstances I am not prepared to hold that the order complained of was improper or passed in an improper use of the discretionary powers of the Court. The plaintiffs, if they have sufficient confidence in their contention are at liberty to disobey the order of the Court and thus obtain a right of appeal; and I am unable to see any good cause for the exercise by me of my powers on the revision side as I can see no pressing cause to do so, nor am I able to see that any irreparable damage is likely to be caused to the plaintiff by the order in question. I accordingly dismiss this petition with costs.

R.M./R.K. *Petition dismissed.*

(2) [1917] 45 Cal. 111=41 I. C. 944.

(3) [1912] 16 I. C. 84.

(4) [1918] 59 P. R. 1918=44 I. C. 549.

(5) [1911] 7 N. L. R. 130=12 I. O. 357.

(6) [1903] 33 P. R. 1903.

## A. I. R. 1919 Lahore 309

SHADI LAL, J.

*Mt. Khairan* — Judgment-Debtor — Appellant.

v.

*Alliance Bank of Simla, Ltd.* and another—Auction-Purchasers — Respondents.

Misc. Second Appeal No. 2377 of 1918, Decided on 28th January 1919, from order of District Judge, Ambala, D/- 27th May 1918.

Civil P. C. (1908), O. 21, R. 84, 89 and 92. (2)—Sale becomes complete when officer conducting sale accepts bid and deposit of 25 per cent. is made—30 days prescribed by R. 92 are therefore to be counted from date of deposit.

A sale of immovable property in execution of a decree is not complete until the officer conducting the sale has accepted the final bid and the purchaser has paid the deposit required by O. 21, R. 84. The terminus a quo for the period of 30 days provided by R. 92 (2), O. 21 must therefore be deemed to be the date of the deposit: 35 All. 65, *Foll*; 1 I. C. 12, *Diss. from*.

Where therefore certain property was knocked down to the highest bidder on 27th July 1917 but the deposit of 25 per cent. on the amount of the purchase-money was not made until 1st August 1917, and the judgment-debtor applied to have the sale set aside and made the required deposit under R. 89, O. 21, on 30th August:

*Held*; that the application presented by the judgment-debtor was within time. [P 310 C 1]

*Tek Chand*—for Appellant.

*Dharm Chand*—for Respondents.

**Judgment.**—The application made by the judgment-debtor under O. 21, R. 89, was dismissed by the Court of first instance as barred by limitation, and that order has been confirmed by the District Judge. It is perfectly clear that no second appeal lies from an order passed by a Court of appeal under O. 43, Civil P. C., and the only question is whether there is any adequate ground for interference on revision. Now, the relevant facts are as follows. The property was knocked down to the highest bidder on 27th July 1917, but the deposit of 25 per cent. on the amount of the purchase money was not made until 1st August 1917. It is common ground that the judgment-debtor made the deposit required by R. 89 on 30th August 1917, and the question whether that deposit was within time depends upon the date which is to be taken as the terminus a quo.

Now, R. 92 (2) lays down that the deposit required by R. 89 must be made within thirty days from the date of sale; and the point for determination is what



is the meaning of the words "the date of sale." Neither of the Courts below has attempted to deal with this matter, and in view of an absence of finding on the question, I consider that the Court of revision must settle the question. A perusal of R. 84 shows that on every sale of immovable property the person declared to be the purchaser is required to pay immediately after the declaration a sum of money equal to twenty-five per cent. of the purchase-money, and that in default of such payment the property must be resold forthwith. It seems to me that a sale of immovable property in execution of a decree is not complete until the officer conducting the sale has accepted the final bid and the purchaser has paid the deposit required by the aforesaid R. 84. The terminus a quo for the period of 30 days must therefore be deemed to be the date of the deposit, vide *Munshi Lal v. Ram Narain* (1). The judgment of the Single Bench in *Atma Singh v. Duni Chand* (2), which lays down that a sale is not complete until the entire purchase-money has been paid, goes too far, and I am not prepared to accept that view of the law. But the dictum that a sale, in respect of which twenty five per cent. has not been deposited, is not a complete sale appears to be perfectly correct and may be cited in favour of the contention of the present judgment-debtor. Accordingly I hold that the application, under O. 21, R. 89, presented by the judgment-debtor was within time, and setting aside the orders of the lower Courts I remit the case to the Subordinate Judge for decision on other matters arising in connection with that application. I direct the parties to bear their own costs in this Court.

R.M./R.K.

*Case remitted.*

(1) [1913] 35 All. 65=17 I. C. 783.

(2) [1909] 1 I. C. 12.

**A. I. R. 1919 Lahore 310**

BROADWAY, J.

*Basheshar Nath*—Petitioner.

v.

*Emperor*—Opposite Party.

Criminal Revn. No. 892 of 1918, Decided on 7th November 1918, from order of Sessions Judge, Karnal, D/- 8th June 1918.

Criminal P. C. (1898), S. 195 — Sanction without naming person to whom it is accorded is invalid.

A sanction to prosecute which omits to specify the person, either by name or by office to whom sanction is accorded is bad in law, and consequently a trial held under such sanction is invalid. [P 311 C 1]

*Jagru Nath*—for Petitioner.

**Judgment.**—The facts of the case out of which this petition for revision has arisen are detailed in the judgment of the learned Sessions Judge and need not be recapitulated here at length. Briefly on 14th January 1918 the District Magistrate of Karnal visited the petroleum store of the petitioner, Basheshar Nath. The petitioner is a manager of a firm styled "Gantam Brothers." Agents of the Standard Oil Company. The petitioner had been granted a license under the Indian Petroleum Act on 19th February 1916. This license had been renewed for 1917, and again renewed on 4th January 1918 for the year ending 31st December 1918. When the original license in 1916 had been applied for, the petitioner had in para. 6 of his application stated that the premises where the petroleum would be stored fulfilled the requirements of the license in Form A, one of the conditions of which is that either the doorways and other openings of the storage shed shall be built up to a height of two feet above the level of the road or street, or the floor sunk to a depth of two feet below the level of the road or street in order to prevent any chance of the petroleum flowing out of the building into the road or street. As stated above, the District Magistrate visited the storage shed on 14th January 1918, and after his visit recorded a note or order to the effect that the premises had been found not to comply with condition three of the license. The license was accordingly cancelled and the note or order proceeds: "I find that Basheshar Nath in his petition of 11th February 1916 said

"The petitioner's shop is situate in Chura Bazar, Karnal, and the said premises fulfil the conditions prescribed by Form A. The Deputy Commissioner accepted this declaration as evidence of the conformity of the shop to the conditions and on the strength of it he gave Basheshar Nath his license. This declaration was however false and Basheshar Nath committed an offence under S. 199, I. P. C. I direct that he be tried by Nawad Umar Daraz Ali Khan."



The petitioner moved the Sessions Judge, asking that the proceedings should be quashed as not being in conformity with law. On 26th February 1918 the learned Sessions Judge came to the conclusion that S. 199, I. P. C., did not apply but expressed his opinion that the case would be more appropriately covered by S. 182, I. P. C. He thereupon remanded the case to the District Magistrate, asking him to pass such fresh orders as he might think fit. The District Magistrate then recorded the following order:

"I am quite indifferent whether the case is under S. 182 or S. 199. It appears to be for the Magistrate to decide which section applies. I give sanction under S. 195 (b) to his prosecution under S. 182 or S. 199 or any other section applicable to the facts."

The petitioner was then tried by Muhammad Umar Daraz Ali Khan, Honorary Magistrate, and convicted of an offence under S. 182, I. P. C., and sentenced to pay a fine of Rs. 100, or in default to undergo three months' rigorous imprisonment. Against his conviction and sentence he appealed to the learned Sessions Judge, who maintained the conviction but reduced the fine to Rs. 25 only.

Before me it has been contended that the proceedings are bad for want of proper legal sanction or complaint. There can be no doubt that the trial was not commenced on a complaint. The learned District Magistrate himself came to the conclusion that the premises used by the petitioner did not comply with the provisions of his license and directed the trial to proceed on a charge under S. 199, I. P. C. The learned District Magistrate appears to me to have been exercising his executive functions when he inspected the premises and therefore he cannot be regarded as having acted under S. 476, Criminal P. O. Later, when the learned Sessions Judge remanded the case to him, he proceeded to accord sanction to the prosecution of the petitioner under S. 195 (1) (b), Criminal P. O. No person was specified either by name or by office to whom the sanction was accorded, and the sanction was therefore bad in law. In this view I am supported by *Atma Ram v. Emperor* (1) and *Queen-Empress v. Rachappa* (2),

(1) [1901] 23 P. R. 1901 Cr.

(2) [1889] 18 Bom. 109.

as well as by *Indar Bhan v. Emperor* (3) and *Ladha Singh v. Emperor* (4). The whole trial therefore is bad and I accordingly set aside the conviction and sentence. If further proceedings are considered necessary, the learned District Magistrate will be at liberty to commence them in accordance with law.

R.M./R.K. *Petition accepted.*

(3) [1905] 30 P. R. 1905 Cr.

(4) [1915] 13 P. R. 1915 Cr.=23 I. C. 107.

## A. I. R. 1919 Lahore 311

BROADWAY, J.

*Sher Khan* —Plaintiff—Appellant.

v.

*Alaf Khan and another* — Defendants — Respondents.

First Appeal No. 2204 of 1918, Decided on 10th February 1919, from decree of Dist. Judge, Attock, D/- 21st July 1913.

(a) Custom (Punjab)—Alienation—Suit for declaration that sale should not affect plaintiff's reversionary right — Plaintiff present at time of registration of deed and well aware of fact of sale—Suit by plaintiff held not maintainable on account of acquiescence.

In a suit for a declaration that the sale of a certain land shall not affect the plaintiff's reversionary rights after the death of the vendor it appeared that the plaintiff who was the vendor's son and was well aware of the fact of the sale objected to the sale a day or two before the execution of the sale-deed but was actually present and accompanied his father when the deed was registered did not take any action for eleven years:

*Held*: that the plaintiff's conduct showed that he had acquiesced in the sale and could not now attack it. [P 313 O 1]

(b) Custom (Punjab)—Alienation — Power of —Pathans of Attock Tahsil.

*Obiter*—Pathans of the Attock Tahsil have an unrestricted power of alienation qua their property whether ancestral or self-acquired.

[P 312 O 2]

*R. Obbard*—for Appellant.

*Sheo Narain and Ghulam Rasul*—for Respondents.

**Judgment.**—The facts of this case are as follows: Plaintiff Sher Khan instituted a suit on 10th May 1913 against Alaf Khan, his father and Fazl Ilahi, asking for a declaration that a sale effected by Alaf Khan in favour of Fazl Ilahi on 1st May 1902 would not affect his rights on the death of Alaf Khan. It was alleged that according to the custom prevalent amongst Pathans of the Attock Tahsil, Alaf Khan had no unrestricted power to alienate ancestral land and further that the sale being without necessity and consideration was void so far as plain-



tiff's rights were concerned. As was to be expected Alaf Khan did not defend the suit. Fazl Ilahi however contested the claim and urged that Alaf Khan's powers of alienation were unrestricted and that the sale was for necessity and full consideration passed. He further alleged that the plaintiff had acquiesced in the sale and therefore was not entitled in any event to the relief prayed for. It was admitted that the property was ancestral.

The following issues were framed: (1) Was the sale in dispute made for consideration and necessity? (2) Has the vendor, Alaf Khan, a Pathan of Waisa unrestricted power of alienation (i. e., as to ancestral property) according to custom? (3) Has plaintiff acquiesced in the sale in dispute? (4) To what relief is plaintiff entitled? The trial Court on issue 1 held that full consideration had passed and that necessity had been established qua a sum of Rs. 2,372, but that there was no evidence as to necessity for the balance of Rs. 17,28. As to issue 2 it was held that Alaf Khan had by custom an unrestricted right to sell the property although ancestral. The conclusion arrived at on issue 3 was that the plaintiff had acquiesced in the sale and was not therefore entitled to any relief. His suit was accordingly dismissed.

The plaintiff thereupon preferred an appeal to the District Judge of the Attock District who upheld the findings of the trial Court. The plaintiff thereupon preferred a second appeal to this Court challenging the jurisdiction of the District Judge of the Attock District to hear the appeal. This appeal was accepted on 30th May 1918 by a Division Bench of this Court of which I was a member, it being held that having regard to *Meugens v. Suttley Flour Mills Ferozepore* (1), the appeal lay to this Court. The appeal was accordingly registered as a first appeal in this Court and has been heard by me in due course.

On behalf of the plaintiff-appellant I have heard Mr. Obbard, while Mr. Sheo Narain addressed me on behalf of the respondent Fazal Ilahi. Mr. Obbard did not attempt to attack the findings as to necessity. Mr. Sheo Narain however referred me to the evidence of the Sadr Qanungo who had drawn up a list showing the various transactions entered into

by Alaf Khan, father of the appellant between 1902 and 1905, and urged that these transactions indicated that the appellant's father was not a spendthrift but a shrewd man of business who had been buying and selling property to advantage. It was further contended that necessity should be presumed in regard to the balance of the money, namely Rs. 1,728 and it was urged that this presumption was all the more necessary in that the plaintiff-appellant had delayed bringing his suit for a period of eleven years. I consider there is some force in this and indeed Mr. Obbard did not attempt to refute Mr. Sheo Narain's contention. Counsel for the appellant addressed me at length in connection with the findings as to custom and as to acquiescence. My attention was drawn to Civil Appeal No. 78 of 1914, decided by a single Bench of this Court on 10th February 1915, in which it was held that the custom contended for by the respondent had not been established. On the other hand Mr. Sheo Narain referred me to Second Appeal No. 2268 of 1916 and Second Appeal No. 1968 of 1918, both cases from this district in which the Courts below had held that Pathans of this part of the country had unrestricted right to alienate their property by custom. Further Mr. Sheo Narain referred me to *Akbar Khan v. Khan Bahadur* (2), in which it was held by LeRossignol, J., that amongst Pathans of Momanpur there is an unrestricted power of alienation of property and that among them the agnatic theory has no force.

Momanpur is said to be a village in the same Tahsil as Waisa and only a few miles distant from it. This decision therefore is of peculiar value in the present instance and for this reason I am inclined to the view that Pathans of this ilaqa have an unrestricted power of alienation qua all their property ancestral as well as self-acquired. It is not however necessary for me to decide this definitely in the present case inasmuch as I am of opinion that the suit must fail on the ground of acquiescence. As has been stated above the sale was effected on 1st May 1902. There is ample evidence on the record to show that the plaintiff was well aware of the fact of this sale. Indeed Karam Chand Patwari, plaintiff's own witness, states that the

(1) [1915] 30 P. R. 1915=27 I. C. 625.

(2) [1916] 69 P. R. 1916=35 I. C. 335.



plaintiff objected to the sale of his ancestral property when his father took the fard a day or two before the sale-deed was actually executed. The plaintiff was then about 25 or 28 years of age and it is a little difficult therefore to understand why he did not take immediate action to safeguard his rights if as a matter of fact he had not acquiesced in the transaction. In addition there is the evidence of persons who attested the deed as well as of the scribe which is to the effect that the plaintiff was actually present and accompanied his father when the deed was registered. I have examined this evidence and can see no reason to differ from the view taken of it by the trial Court. This evidence coupled with the fact that the plaintiff took no action for eleven years is to my mind the strongest possible indication that he had acquiesced in the sale when it was effected. It seems to me that the plaintiff has been influenced by the rise in the price of land of late years and has brought this suit speculatively in the hope of gaining an advantage. I find that the plaintiff acquiesced in the sale and cannot now attack it. I accordingly dismiss the appeal with costs.

R.M./R.K. *Appeal dismissed.*

### A. I. R. 1919 Lahore 313 (1)

LEROSSIGNOL, J.

*Municipal Committee, Rohtak*—Defendants—Appellants.

v.

*Karimuddin*—Plaintiff—Respondent.

Second Appeal No. 1615 of 1917, Decided on 14th May 1918, from decree of Dist. Judge, Karnal, D/- 22nd February 1917.

Punjab Municipal Act (3 of 1911), S. 121—Civil Court is not competent to interfere with order under S. 121.

A civil Court has no jurisdiction to interfere with a Municipal Committee's order under S. 121 in the absence of a finding that the action of the Committee is wanton or without any jurisdiction or is tainted by mala fides. [P 313 C 1]

*Moti Sagar*—for Appellant.

*Faz-li Hussain*—for Respondent.

**Judgment.**—In my opinion the Courts, in the absence of a finding that the action of the Municipal Committee was wanton or without any justification or was tainted by mala fides, have no jurisdiction to interfere with the Committee's order under S. 121. They have no right whatever to merely substitute their judgment as to

the noxious character of a trade for that of the Committee.

It is notorious that the neighbourhood of a skin dyeing factory is pervaded with annoying smells and the opinion of one expert in such matters outweighs that of any number of the common people.

I accept the appeal and dismiss the suit with costs throughout.

R.M./R.K. *Appeal accepted.*

### A. I. R. 1919 Lahore 313 (2)

BROADWAY AND ABDUR RAOOF, JJ.

*Pindi Dayal and others*—Defendants—Appellants.

v.

*Kishun Kunwar and another*—Plaintiffs—Respondents.

Second Appeal No. 1334 of 1915, Decided on 3rd May 1919, from decree of Addl. Dist. Judge, Delhi, D/- 30th March 1915.

Civil P. C (1908), O. 23, R. 1—Order permitting plaintiff to withdraw suit is not appealable.

An order passed under O. 23, R. 1, permitting the plaintiff to withdraw his suit, does not come under the definition of "decree" as given in Cl. (2), S. 2, nor is it included in the list of appealable orders given in O. 43, R. 1, and is consequently not appealable. [P 314 C 1, 2]

*Lala Moti Sagar*—for Appellants.

*Pandit Sheo Narayan*—for Respondents.

**Judgment.**—The facts out of which this appeal has arisen are the following : Pindi Dayal and Deoki Nandan, defendants 1 and 2, executed a mortgage on 13th February 1905 in favour of the plaintiff, Manohar Lal. Piare Lal and Madho Ram, defendants 3 and 4, stood sureties for the mortgage debt. It appears that the plaintiff brought a suit about 4 years ago for the recovery of interest which had fallen due, but failed to include in that suit a claim for the principal which had become payable under the terms of the mortgage. The suit was decreed. The present suit he has brought for the recovery of the principal against the mortgagors and the sureties.

In the plaint it is stated that the plaintiff is in possession of the mortgaged property and that when he instituted the suit for interest the period of the mortgage had been extended by mutual consent by two years. The suit was contested by the principal defendants upon several grounds. Two of the pleas set up in the defence were that the suit was



barred by O. 2, R. 2, Civil P. C., and that the allegation as to the extension of the period of mortgage by two years was without foundation. Defendants 3 and 4 resisted the suit on the plea that the plaintiff, by his own act having lost his remedy against their principals, was not entitled to sue them as sureties. The Court of first instance sustained these pleas and having come to the conclusion that the claim was barred by O. 2, R. 2, held that the suit was not maintainable either against the principals or their sureties. The claim was therefore dismissed against both sets of defendants. An appeal was preferred by the plaintiff in the lower appellate Court impugning the findings of the Court of first instance. The tenth ground in the memorandum of appeal filed in the lower appellate Court was taken as an alternative plea and ran thus :

"Should the Court consider that the plaintiff is not entitled to a decree and his remedy by a suit for money is barred, it is submitted that the plaintiff be allowed to withdraw with liberty to enforce any other remedies he may in law possess, e.g., for rent, etc., on the basis of defendants' lease in plaintiff's favour."

On the appeal coming on for hearing the learned Judge of the Court below gave effect to the last plea and granted the prayer for the permission to withdraw the suit. He held that the money claimed was, undoubtedly, due to the plaintiff and that the defendants in consequence of the dismissal of his suit might raise difficulties as to the plaintiff's right to continue in possession. In his opinion, the case was eminently one in which permission to withdraw should have been allowed. An order was consequently passed allowing the plaintiff to withdraw the suit with liberty to sue against the principal defendants Pindi Dayal and Deoki Nandan.

Against this order the present appeal was filed by the defendants in this Court and was admitted to a Division Bench on 7th July 1915. On the appeal coming on for hearing before us a preliminary objection to its hearing was raised by Pandit Sheo Narain, the counsel for the plaintiff-respondent. He contended that the order appealed against was passed under O. 23, R. 1, and as such was not appealable under the Code. It does not come under the definition of "decree" as given in Cl. (2), S. 2, Civil P. C., nor is it included in the list of appealable orders given in

O. 43, R. 1. Rai Sahib Moti Sagar frankly admitted the force of the objection, but he asked us to treat his memorandum of appeal as a petition for revision and set aside the order of the lower appellate Court. This, having regard to the facts of this case, we declined to do. It is doubtful whether an order passed by a Court in the exercise of its discretion under O. 23, R. 1, can be revised by a High Court under S. 115 of the Code. It is not however necessary to express any definite opinion on this point in this case. The appellant has chosen to file an appeal and all that we have to decide is whether an appeal lies. It is clear, as admitted by Rai Sahib Moti Sagar himself, that an appeal does not lie. We therefore dismiss it with costs and refuse to accede to the prayer of Rai Sahib Moti Sagar to convert it into a revision.

R.M./R.K.

*Appeal dismissed.*

### \* A. I. R. 1919 Lahore 314

RATTIGAN, C. J. AND ABDUL RAOOF, J.  
*Mahomed Ibrahim*—Plaintiff—Appellant.

v.

*Allah Bakhsh and others*—Defendants—Respondents.

First Appeal No. 2655 of 1917, Decided on 28th April 1919, from decree of Senior Sub-Judge, Gujranwala, D/- 28th August 1917.

\* (a) Civil P. C. (1908), O. 32, R. 7, Sch. 2, Para. 1—Application of guardian of minor under Sch. 2, Para. 1, comes within purview of O. 32, R. 7—Leave of the Court must be expressly obtained and recorded.

An application of the guardian or next friend of a minor under Sch. 2, para. 1, comes within the purview of O. 32, R. 7, of the Code, and, unless the leave of the Court is expressly obtained and recorded, the application will have the same effect and be open to the same objections as would any other agreement or compromise entered into by such guardian or next friend with reference to the suit without the leave of the Court expressly recorded in the proceedings: 15 I. C. 161, *Foll.* [P 316 O 2]

\* (b) Civil P. C. (1908), O. 32, R. 7 and Sch. 2, Para. 1—Reference to arbitration by next friend of minor plaintiff—Ratification of reference by conduct—Plaintiff cannot contest reference.

One H carried on business in partnership with one N. H having died, his sons, A, B and C, sued N, for dissolution of the partnership and settlement of accounts. During the pendency of the suit C died and the present plaintiff's name was substituted as a co-plaintiff with B, his uncle, as the next friend. Subsequently the parties agreed to refer the dispute to arbitration and applied to the Court for an order of reference, which was granted. The arbitrator gave his



award, but the plaintiff being dissatisfied with it filed objections. Eventually a decree was passed in accordance with the award. Plaintiff then brought the present suit for a declaration that the decree was null and void and ineffectual against him. It appears that the plaintiff had been well represented in the earlier suit and had by his conduct accepted the situation and did not impugn the reference to arbitration, but was contented to contest the award on the ground of the misconduct of the arbitrator:

*Held*: that as the plaintiff's next friend did not obtain an express sanction of the Court before referring the case to arbitration, the plaintiff's claim was maintainable, but that as he had expressly ratified and affirmed the reference, he was debarred from contesting it. [P 317 C 1]

*Sheo Narain and Fazl-i-Hussain*—for Appellant.

*Nanak Chand and Brij Lal*—for Respondents.

**Judgment.** — This appeal has arisen out of a suit brought by the plaintiff-appellant for a declaration that the decree dated 14th May 1914 passed by the Chief Court on the basis of an award dated 22nd October 1908 was null and void and ineffectual against him. The facts giving rise to the suit are the following. One Haji Sikandar carried on a business in partnership with one Nur Din. Haji Sikandar having died left three sons, Umar Din, Muhammad Din and Charagh Din, as his heirs and legal representatives. In 1898 the three brothers brought a suit against Nur Din for the dissolution of the partnership and the settlement of accounts. During the pendency of the suit, Charagh Din having died, the name of the appellant Ibrahim was substituted in the place of his father as a co-plaintiff, with Muhammad Din, his uncle, as the next friend. It appears that in 1908 the parties to the suit agreed to refer the matter in difference between them to arbitration and applied to the Court on 13th July 1908 for an order of reference. In the hearing of the application the parties were described thus: Muhammad Din and Umar Din, sons of Haji Sikandar, and Muhammad Ibrahim, minor son of Charagh Din, residents of Nizamabad plaintiffs; versus Nur Din, son of Ismail, resident of Nizamabad defendant. At the foot of the petition the following description was given: Petition of Muhammad Din, son of Haji Sikandar, and Muhammad Ibrahim, minor son of Charagh Din through Muhammad Din, his Taya. The petition was signed by Muhammad Din, Ilm Din, agent of the plain-

tiffs, and Nur Din defendant, and was couched in the following words:

"In the above noted case we, the parties, have unanimously nominated Pandit Prem Nath Kaul, record-keeper of the District Court, Rawalpindi. We do hereby agree that the award which may be given by the said arbitrator will be final and we, the parties, will accept and abide by that award on the issue framed by the Court and also as regards the point which party owes money, how much and to whom. Hence we have executed this agreement that the whole case may be made over to the arbitrator for disposal."

The Court made the following order on the petition:

"It is ordered that according to the application of the aforesaid parties the case for disposal of the issues and the point as to how much money is on account of the business in question, which party owes it and to whom it is due under the account between them, be made over to the arbitrator."

The arbitrator gave his award and filed it in Court on 22nd October 1908. The plaintiffs were dissatisfied with the award and filed objections impugning its correctness. The Court by its order dated 18th December 1908 set aside the award and proceeded to decide the case on the merits. A decree was passed on 10th July 1909. Both the parties were dissatisfied with the decree and preferred cross-appeals to the Chief Court. In the memorandum of appeal filed by the defendant Nur Din the first plea taken was that the lower Court had erred in law and had acted without sufficient ground in setting aside the award. The Chief Court accepted this plea in appeal, set aside the decree of the lower Court and passed a decree in accordance with the award on 14th May 1914. The plaintiff's appeal was dismissed. Thereupon the plaintiffs presented on 11th July 1914 a petition for review of judgment. The question of the minority of the plaintiff-appellant Ibrahim was raised at the hearing. It was argued that by a petition dated 13th October 1908 Muhammad Din had withdrawn from the guardianship of the minor plaintiff and that the latter himself had, by a petition dated 14th October 1908, applied to the arbitrator to appoint another person as the guardian ad litem, but no notice had been taken of these applications and no one had been appointed to take the place of the retiring next friend.

The Court went into this question fully and came to the conclusion that the interests of the plaintiffs had been



fully looked after by Ilm Din, their mukhtar-i-am. It was held that Muhammad Din upon his own admission knew little or nothing about the matter in dispute and trusted entirely, for the conduct of the case, Ilm Din who was conversant with all the details. All possible objections were raised and argued before the Court by Mr. Beechey on behalf of the plaintiffs, but there appears to be no indication in the judgment that the legality of the reference to arbitration was challenged in any shape or form. It would rather appear from the objections relating to the conduct of the arbitrator that the propriety of the reference was tacitly accepted. In this connexion it is important to bear in mind that the appellant had in the meantime attained majority and was fully competent to take care of his interest. According to the evidence he was born on 20th June 1894. He must therefore be taken to have attained majority some time in June 1912. In 1914 he was more than 20 years old. He must certainly have been aware of the litigation which was going on. No question appears to have been raised on his behalf that the reference to arbitration during his minority had been invalidly or irregularly made. Probably he had accepted the situation and was contented to contest the award on the ground of the misconduct of the arbitrator.

The petition for review of judgment was rejected on 23rd October 1914. The present suit has been instituted against Allah Bakhsh and Khuda Bakhsh, the sons of Nur Din, mainly on the ground that inasmuch as the agreement referring the dispute to arbitration was not expressly sanctioned by the Court, the reference was invalid and consequently the award of the arbitrator and the decree based on it were null and void and ineffectual against the plaintiff. The other grounds are detailed in Cls. (b), (c) and (d), para. 5 of the plaint. These latter grounds were fully discussed and disposed of by the learned Judges who heard and decided the application for review. The suit was contested by defendants 1 and 2 while defendants 3 and 4, Muhammad Din and Umar Din, for obvious reasons admitted the claim. The learned Subordinate Judge for the reasons set forth in his judgment has dismissed the suit and the plaintiff has

come up in appeal to this Court. The first contention raised before us is that the lower Court, having found that "the plaintiff's next friend did not obtain an express sanction of the Court before referring the case to the arbitration of Pandit Prem Nath,"

was wrong in dismissing the plaintiff's claim. In support of this contention the Full Bench ruling of this Court in *Ganesh v. Mul Chand* (1) and the provisions of O. 32, R. 7, are relied upon. On behalf of the defendant-respondents it has been argued that the provisions of O. 32, R. 7, are not applicable to an application referring a matter to arbitration, inasmuch as it is neither an agreement nor a compromise within the meaning of this rule. The decisions of the Allahabad High Court are cited by the learned counsel in support of his contention, namely, (1) *Hardeo Sahai v. Gouri Shankar* (2) and (2) *Lutawan v. Lachiya* (3). The first was a decision under Ss. 362 and 506 of the old Code of 1882. The second decision is under the new Code and is certainly in point and supports the argument, but it is opposed to the Full Bench ruling of this Court.

Moreover the view on this point was expressed by only two of the Judges who constituted the Full Bench and was not shared in by Sir Pramoda Charan Banerjee, the third Judge. He did not express any opinion on this point at all. We are bound by the Full Bench ruling of this Court which, in our opinion lays down the correct law on the point. According to the decision an application of the guardian or next friend of a minor under S. 506 of the former Civil P. C., or under Sch. 2, para. 1, of the present Code comes within the purview of S. 462 of the former Code or O. 32, R. 7, of the present Code, as the case may be, and unless the leave of the Court is expressly obtained and recorded, the application will have the same effect and be open to the same objections as would any other agreement or compromise entered into by such guardian or next friend with reference to the suit without the leave of the Court, expressly recorded in the proceedings. The decision however having regard to the facts of the case, does not help the plaintiff-appellant. At p. 332 of

(1) [1912] 35 P. R. 1912=15 I. C. 161.

(2) [1906] 28 All. 35.

(3) A.I.R. 1914 All. 446=36 All. 69=21 I. C. 989.



P. R. 1912 of the report the following observation is to be found:

"The leave or sanction of the Court must be obtained and must be expressly recorded if the reference to arbitration is to be valid for all purposes and against all parties including the minor, but it does not follow that in a case where such sanction has not been obtained, the reference must necessarily be invalid or void. The minor alone can claim to avoid it . . . but it is of course open to him, if so advised, to affirm and ratify the reference to all subsequent proceedings."

In this case there is evidence to show that the appellant did affirm and ratify the reference and all subsequent proceedings. In his application dated 2nd March 1917 he referred to the decree in question and alleged that a compromise had been arrived at between the parties in connexion with the execution of that decree. This statement in the application clearly indicates that the appellant had accepted the decree as valid and correct. The plaintiff has been examined as a witness in this case and his evidence goes to show that so far as he was personally concerned, he had no knowledge of any defect. As we have said before no objection was put forward on his behalf at the hearing of his appeal or his application in this Court. He to all intents and purposes had accepted and ratified the reference to arbitration. It is clear from the evidence on the record that his next friend and his uncle, Umar Din, diligently prosecuted the previous suit in which he was equally interested. A reference to the proceedings in that suit show that all that was possible to do was done by him. When the award was found objectionable he got it set aside by the first Court. When the decision on the merits was against the plaintiffs in some respects, an appeal was preferred to the Chief Court. Eventually when the decision of the Chief Court was given against the plaintiffs, a petition of review was filed and hotly contested. This is not a case in which it has been shown that the interest of the minor has in any way suffered. The question as to the gross negligence and carelessness on the part of the next friend was fully considered and disposed of by this Court in the previous litigation and has been fully dealt with by the learned Subordinate Judge in his judgment in the present case. We fully agree in the conclusions arrived at by him on the evidence on the record. As regards the prosecution of the case

before the arbitrator, we have no doubt on the evidence that in spite of his application dated 13 October 1908 Muhammad Din continued to prosecute the case both in the lower Court and the Chief Court. Ilm Din, the agent, continued to act and look after the case before the arbitrator as long as anything useful and material was to be done. In this view it is not necessary to decide the question whether, having regard to the fact that at the date of the decree of this Court in the previous suit the appellant had obtained majority, it is open to him now to challenge the validity of the decree by a separate suit. The cases of *Seshagiri Rao v. Tangaturi Jagannadan* (4) and *Mt. Khadija v. Mt. Fidyatuz Zohrah* (5) appear to support the argument of Mr. Nanak Chand, but we do not think it necessary to base our decision on this ground as the suit must fail on the grounds set forth above. We confirm the decree of the Court below and dismiss the appeal with costs.

R.M./R.K.

*Appeal dismissed.*

(4) [1916] 39 Mad. 1031=32 I. C. 391.

(5) [1919] 24 P. R. 1919=49 I. C. 707.

### A. I. R. 1919 Lahore 317

RATTIGAN, C. J. AND DUNDAS, J.

*Shankar Lal*—Defendant—Appellant.  
v.

*Arjmand Khan and another*—Plaintiff  
—Defendant—Respondents.

Misc. Second Appeal No. 3137 of 1915,  
Decided on 21st May 1919, from decree  
of Dist. Judge, Hissar, D/- 30th August  
1915.

Civil P. C. (1908), O. 6, R. 17—Honest  
mistake of fact—Amendment of plaint is  
permissible.

The plaintiff in a suit for pre-emption included in his plaint some land not actually sold but taken by the vendee in exchange for an equal area of the land sold. On finding his mistake he applied to amend his plaint so as to include the actual lands sold:

Held: that the plaintiff may well have been misled as to the identity of the lands which he could claim and there was no sufficient reason why he should not be allowed to correct his mistake. [P 318 C 1]

*Tek Chand, Muhammad Rafi for Muhammad Shafi*—for Appellant.

*Fazl-i-Hussain*—for Respondents.

**Judgment.**—The plaintiff in bringing a suit for pre-emption included in his plaint some land which had not actually been transferred by the sale of which pre-emption was claimed but had been



taken by the vendee in exchange for an equal area of the land sold. Finding that he would be unable to acquire this land by pre-emption, the plaintiff applied to amend his plaint so that his claim should include the actual lands sold and not any land which had been acquired by the vendee in exchange. This application was disallowed, but on appeal the District Judge directed the necessary amendment to be made. An appeal has been lodged by a rival pre-emptor who was impleaded as a defendant in the suit. We see no reason to doubt that the plaintiff did intend to pre-empt the sale as a whole and if he was misled as to the identity of the lands which he could claim, this may well have been an honest mistake and there is no sufficient reason why the plaintiff should not be allowed to correct it. We therefore think that the order of the District Judge was a proper order and we have not thought it necessary to call upon the respondents to answer the appellant. The appeal is dismissed with costs.

R.M./R.K. *Appeal dismissed.*

### A. I. R. 1919 Lahore 318

CHEVIS AND ABDUL RAOOF, JJ.

*Shambhu Nath*—Defendant — Appellant.

v.

*Mt. Ralli*—Plaintiff—Respondent.

First Appeal No. 746 of 1915, Decided on 9th January 1919, from decree of Senior Sub-Judge, Lahore, D/- 1st February 1915.

(a) Civil P. C. (1908), O. 22, R. 3—Appeal—Death of sole appellant—Failure to bring legal representative on record—Appeal abates, although legal representative are brought on record as respondents in cross-appeal.

Where a sole appellant dies and no application is made to bring his legal representatives on to the record, the appeal abates. The fact that in a cross-appeal the deceased's legal representatives have been brought on to the record as respondents will not suffice to prevent his appeal from abating. [P 318 C 1]

(b) Hindu Law—Succession—Sister is not heir to brother and cannot be brought on record as such—Civil P. C. (1908), O. 22, R. 3.

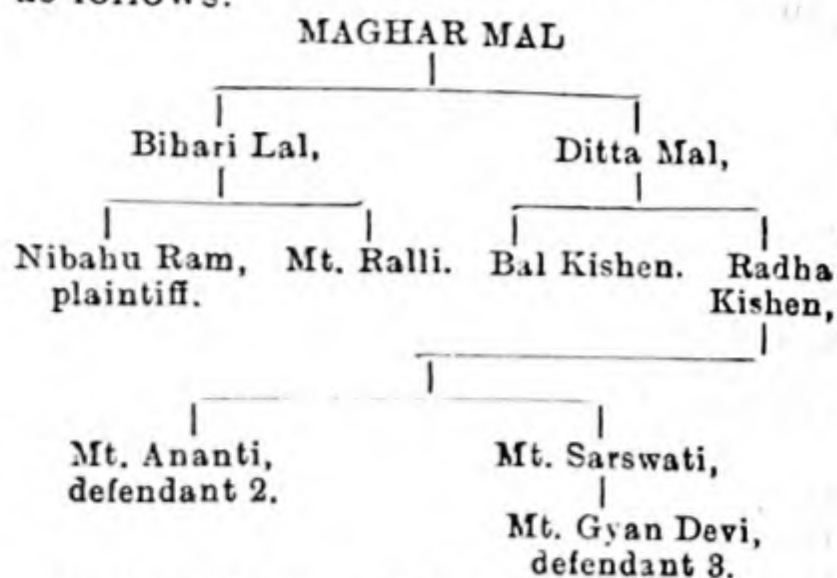
Under the Mitakshara School of Hindu law a sister is not an heir at all to her brother, and, consequently, cannot be brought on to the record as the heir and legal representative of her deceased brother to continue a suit or appeal.

[P 318 C 1, 2]

*Durga Das*—for Appellant.

*Jai Gopal Sethi*—for Respondent.

**Judgment.**—The genealogical tree is as follows:



Bal Kishen died sonless, leaving a widow Mt. Thakri, who died on 28th July 1913. Her brother Shambhu Nath is defendant 1. The case relates to the estate of Bal Kishen. Nibahu Ram sued for possession, alleging that Shambhu Nath was in illegal possession. Plaintiff alleges that Mt. Thakri succeeded to a life tenure only. The defence was that the plaintiff had sold his rights to Mt. Thakri for Rs. 1,155, and that Mt. Thakri had executed a will in favour of the defendants. The Senior Subordinate Judge held that the sale of reversionary rights was invalid, that the will executed by Mt. Thakri was also invalid, but that it was not proved that Mt. Thakri had left any property, except the houses mentioned in the will. So the learned Subordinate Judge gave plaintiff a decree for the houses but dismissed the suit for the rest of the property. Against the Subordinate Judge's decree three appeals were lodged, one by the plaintiff (admitted as a pauper appeal in March 1915), one by Shambhu Nath, and one by Mt. Ananti and Mt. Gyan Devi. This judgment will cover all three appeals.

Nibahu Ram died in May 1915. The defendants appellants put in applications, asking that Nibahu Ram's sister Mt. Ralli should be brought on to the record of their appeals as representatives of the deceased respondent. On these applications there are orders of the Deputy Registrar of this Court granting the applications subject to confirmation by the Court. In the appeal lodged by Nibahu Ram no application has ever been made for bringing his representative on to the record. Jai Gopal, who represents Mt. Ralli in this Court, says his client made no application as she thought that as she had been made respondent in the cross-appeals, this was



sufficient. It is not sufficient. As no application for bringing a representative on to the record in due time has been made, the appeal lodged by Nibahu Ram has abated. On behalf of Shambhu Nath, appellant, a fresh application has been put in urging that the application for bringing Mt. Ralli on to the record was made under a mistake of law, and that the real representative, if any, is Mt. Ananti. The latter however is only a daughter of the first cousin of the deceased, and Lala Durga Das is unable to show us how such a relation can be regarded as an heir under Hindu law. But the question remains whether the sister is an heir. Mr. Jai Gopal Sethi urges that in the absence of other heirs the sister must be regarded as the legal representative of the deceased. The whole subject is ably discussed in *Mayne on Hindu Law and Usage*, Edn. 8, p. 724—753, wherein it is pointed out that as regards the provinces which follow the Mitakshara School both principle and authority seem to exclude the daughter. Counsel refers us to *Lakshmanammal v. Tiruvengada Mudali* (1) and *Bhagwan Vithoba v. Warubai* (2). We think it unnecessary to enter into any lengthy discussion. We may only remark that in Northern India it has always been held that under the Mitakshara School a sister is not entitled to inherit, and we prefer to follow what seems to us the decided weight of authority.

Then it is urged that in the absence of other heirs the sister must inherit. But as we understand the law the position of the sister is not that she is an ultimate heir, but that she is not an heir at all. Then it is urged that a legal representative need not be an heir, and here *Charanjit Mal v. Mitho* (3), is relied on. But in that ruling certain reversioners were allowed to remain on the record on the great probability that they were as much the next heirs and representatives as the other persons who were pointed out as the heirs. Here however we find that there are no heirs at all, so far as we can discover; at all events we hold that the sister is not an heir. We therefore refuse to confirm the order of the Deputy Registrar bringing Mt. Ralli on to the record as representative of the

deceased plaintiff-respondent and we strike her name off. There being no respondent the appeals lodged by the defendant cannot proceed, and must be dismissed. The effect is, of course, practically the same as if the appeals were accepted, as Mt. Ralli cannot execute the decree of the lower Court and it does not appear that there is anyone else who can. The defendants-appellants are to blame for having named her as representative, but on the other hand she was in no way bound to defend these appeals; and if she wished to avoid the risk of being ordered to pay costs she could have appeared and pleaded that she was not the heir and had wrongly been impleaded, instead of attempting to show that she was the heir. We think the proper course is to leave the parties to bear their own costs in this Court. All three appeals are dismissed, but we pass no order as to costs in this Court.

R M./R.K. Appeals dismissed.

### A. I. R. 1919 Lahore 319

SHADI LAL AND MARTINEAU, J.J.  
Arur Singh—Plaintiff—Appellant.

v.

Todar Mal and others—Defendants—Respondents.

First Appeal No. 2333 of 1914, Decided on 17th December 1918, from decree of Dist. Judge, Amritsar, D/- 16th June 1914.

(a) Civil P. C. (1908), O. 22, R. 4—Respondent dying—Appellant ignorant of death—Application for bringing legal representatives on record after abatement of appeal—There is sufficient cause.

One of the respondents to an appeal died on 15th June 1917, but the application to bring his legal representative, on the record was not made till 15th January 1918, after the appeal had abated as against him. The appellant stated in his affidavit that he came to know of the respondent's death only on receiving a notice from the Court which was sent to the appellant's pleader on 28th December 1917.

Held: that under the circumstances there was sufficient cause for the plaintiff-appellant not making an application within the prescribed period and that as he had made the application without undue delay after being informed of the respondent's death the abatement of the appeal against the deceased respondent should be set aside.

[P 320 O 2; P 321 O 1]

(b) Transfer of Property Act (1882), S. 54—Agreement to execute sale deed on happening of certain contingency may give cause of action to sue for specific performance, but does not create of itself any interest in or charge on property.

B, a widow, sold certain land to one G on 8th January 1889. On 11th February 1890 one of her reversioners H executed in favour of the

(1) [1882] 5 Mad. 241.

(2) [1903] 32 Bom. 300.

(3) [1888] 29 P. R. 1888.



plaintiff an agreement which set forth that *H* intended to sue for the cancellation of the sale by *B* and that on being successful he would give possession of half the land to the plaintiff and get a sale deed registered in his favour. *H* brought the suit successfully, but after obtaining a decree he sold his reversionary rights in the land to *G* by a deed dated 18th December 1895. Subsequently the land was sold in execution of a decree against the descendants of *G* and was purchased by defendant 5. Plaintiff now sued for a declaration that one-half of the land was held by defendant 5 subject to the plaintiff's rights under the agreement executed by *H* on 11th February 1890.

*Held*: (1) that there was no sale effected by *H* of his reversionary rights in favour of the plaintiff, but only a contract to sell half the land on the happening of a certain contingency; (2) that such a contract did not of itself create any interest in or charge on the property; (3) that the only right which the contract gave to the plaintiff was a right to obtain a conveyance of half the land from *H* when *H* should get possession; (4) that the plaintiff may be entitled to sue for specific performance on the death of *B*, but he had no cause of action to bring the present suit: 23 *Bom.* 181, *Foll.*; 13 *P. R.* 1899, *Dist.*

[P 321 C 1, 2]

*Fazl-i-Husain, Gobind Das and Bhagat Ram Anand*—for Appellant.

*Moti Sagar, Duni Chand, Santanam and Ralli*—for Respondents.

**Judgment.**—Mt. Basant Kaur, widow of Sewa Singh, sold 249 ghumaos 6 kanals and 14 marlas of land on 8th January 1889 to Rai Gopal Das after having about a year before mortgaged the land to Karm Chand. On 11th February 1890 Hira Singh, one of the reversioners of Basant Kaur, executed in favour of the plaintiff an agreement which is the basis of the present suit. The agreement set forth that Hira Singh intended to sue for the cancellation of the alienations effected by Basant Kaur, that the plaintiff was to bear all the expenses of the litigation, that Hira Singh was not to compromise the case without the plaintiff's consent, and if he did so was to pay Rs. 5,000 as damages, and that when he took possession of the 249 ghumaos 6 kanals and 14 marlas he would give possession of half to the plaintiff and get a sale deed registered in his favour, failing which he would pay a further sum of Rs. 1,000 as damages. Hira Singh brought suits for a declaration that the alienations by Basant Kaur should not affect his reversionary rights, and he succeeded in them. But after obtaining decrees in those cases he sold his reversionary rights in the land to Rai Gopal Das by a deed dated 18th December 1895, the execution of

which we agree with the lower Court in finding has been proved. Amar Singh and Kirpal Singh, two other reversioners of Basant Kaur, had previously sold their reversionary rights to Rai Gopal Das by deeds dated 30th May 1889 and 19th June 1890 respectively. Hira Singh is dead and has left three sons who are defendants 6 to 8.

Phagu Mal, defendant 4, obtained a decree against defendants 1 and 2, who are the sons of Rai Gopal Das, and defendant 3, his grandson, and the land in dispute was attached in execution of the decree. An objection by the plaintiff was disallowed and the land was put to sale and was purchased by Mr. Todar Mal, defendant 5 on 7th July 1911. In the present suit the plaintiff asks for a declaration that one-half of the land is held by defendant 5 subject to his (plaintiff's) rights under the agreement executed by Hira Singh on 11th February 1890. The lower Court has dismissed the suit holding: (1) that the agreement of 11th February 1890 is void; (2) that the plaintiff has no right in the land and is entitled to no relief against defendant 5, who has become the owner of the land by purchase; and (3) that he is estopped by his conduct from suing. The plaintiff has appealed.

Defendant 1 Gyan Chand died on or about 10th June 1917, and the application to have his representative impleaded was not made within the period prescribed by law, but was made on 15th January 1918 after the appeal had abated as against Gyan Chand. It is contended for the respondent that the application was one under O. 22, R. 4, Civil P. C., and that the time for presenting it could not be extended. We think that the application, though purporting to be made under R. 4, may fairly be treated as one under R. 9 for setting aside the abatement. We see no reason for doubting the appellant's statement in his affidavit that he came to know of Gyan Chand's death only on receiving a notice from this Court. The letter intimating that Gyan Chand was reported to have died was sent by this Court to the plaintiff's pleader on 20th December 1917. Taking all the circumstances into consideration we are of opinion that there was sufficient cause for the plaintiff not applying within the prescribed period and that he made the application without undue de-



lay after being informed of Gyan Chand's death. The abatement of the appeal against Gyan Chand is therefore set aside.

The case has been argued before us at some length, but there is only one point which we need discuss, namely, the question whether the plaintiff has a cause of action, as we are of opinion that on this point the appeal must fail. The plaintiff alleges in his plaint that by virtue of the agreement of 11th February 1890 with Hira Singh he will become owner of one-half of the 240 ghumaos 6 kanals and 14 marlas on the death of Basant Kaur, but it is apparent that he has put a wrong construction on the document. There was no sale effected by Hira Singh, but he only agreed that when he got possession of the land he would give possession of one half to the plaintiff and execute a sale-deed in his favour.

Counsel for the appellant argues that it is not necessary that his client should have any present interest in the land, and that he is entitled to sue if he has a contingent interest in it, and he has referred to *Malik Ala Bakhsh v. Ghulam* (1) in which it was held that the sale of a reversionary right of succession, though at the time it does not effect a transfer of the property, gives rise to a right which can be enforced when the estate falls into possession. But in the present case Hira Singh did not sell his reversionary rights to the plaintiff, and the latter has not even a contingent interest in the land. There was only a contract to sell half the land on the happening of a certain contingency, namely, on his getting possession of the land. Such a contract did not of itself create any interest in or charge on the property (S. 54, T. P. Act), and the only right which the contract gave to the plaintiff was a right to obtain a conveyance of half the land from Hira Singh whenever Hira Singh should get possession. The point is so clear that it is unnecessary to refer to all the authorities cited before us, but we may mention *Mahadeo Chintaman Wadekar v. Vasudev J. Kirtikar* (2) as being a case somewhat similar to the present one. In that case, where some land subject to a mortgage was sold in execution of a decree by the mortgagee, it was held that a person who had contracted to purchase the land

was not entitled to apply to set aside the sale, as no rights in the land had been created in his favour, and that he had only a personal right against his vendor, or the assignee with notice of his vendor, to compel him by a suit for specific performance to perform his contract, and no direct right over the land.

The suit provided for in O. 21, R. 63, Civil P. C., as well as in S. 42, Specific Relief Act, is one to establish the plaintiff's right in the disputed property. If, as in the present case, the plaintiff has no right in the property he is out of Court. He may be entitled to sue for specific performance of his contract on the death of Mt. Basant Kaur, but he has no cause of action entitling him to bring the present suit, and we accordingly dismiss the appeal with costs.

R.M./R.K.

*Appeal dismissed.*

### A. I. R. 1919 Lahore 321

MARTINEAU, J.

*Paras Ram Jawala Das—Plaintiff—Appellant.*

v.

*Gian Chand — Defendant — Respondent.*

Second Appeal No. 2303 of 1918, Decided on 10th February 1919, from decree of Dist. Judge, Lyallpur, D/- 29th April 1918.

(a) *Hindu Law—Debt—Manager—Benefit of family cannot be presumed—Burden of proof is on creditor.*

There is no presumption that a debt contracted by the manager of a Hindu firm or family is contracted for the benefit of the firm or family; 30 I. C. 500, *Diss. from*; 34 All. 135 and 30 I. C. 481, *Foll.*

The onus is on the creditor to prove that the debt was contracted for the benefit of the family. [P 322 O 1, 2]

(b) *Hindu Law—Debt—Father — Suit on accounts with deceased father — Decree against son obtained — Sons sought to be made personally liable — Father and son found to be joint though business carried on in father's name—Onus of proof of family benefit is on creditor—On failure no personal decree can be passed.*

Where plaintiff sued to recover a certain sum of money alleged to be due on an account between the plaintiff and the defendant's deceased father and having obtained a decree for the amount due to be recovered from the property left by the deceased sought to make the defendant personally liable, it having been found that the defendant and his father were members of a joint Hindu family although the business was carried on by the father alone in whose name the account stood:

*Held*: that the onus was on the plaintiff to prove that the debt contracted by the deceased

(1) [1899] 18 P. R. 1399.

(2) [1899] 23 Bom. 181.



was for the benefit of the family and that having failed to discharge that onus he was not entitled to a personal decree against the defendant. [P 322 C 2]

N. C. Pandit for Tek Chand — for Appellant.

Nand Lal—for Respondent.

**Judgment.**—The defendant's deceased father Jita Ram had an account with the plaintiffs, and they have been given a decree for the amount due to them to be recovered from the property left by the deceased. The question in the appeal which the plaintiffs have filed in this Court is whether they are entitled to a decree against the defendant personally.

The defendant and his father were members of a joint Hindu family but the account stood in the name of Jita Ram alone and it has been found by the lower appellate Court that Jita Ram alone was carrying on the business and that although the defendant had been receiving sums of money from the plaintiffs and had signed the last balance, these facts do not show that he was acting independently of his father. The lower appellate Court means apparently that the defendants did these acts only as his father's agent and not on his own account.

There was a further finding by the first Court that the plaintiffs had failed to prove that the debts had been contracted by Jita Ram for the benefit of the family and it appears from the judgment of the learned District Judge that he agrees with that finding. The plaintiffs moreover did not dispute the correctness of that finding in their appeal to the District Judge. The case then turns upon the decision of the question on whom the burden of proof lies whether the plaintiffs have to prove that the debt was contracted for the benefit of the family or whether it is for the defendant to prove the contrary. For the appellants reliance is placed on *Brij Lal v. Jaishi Ram* (1), in which Sir Donald Johnstone, C. J., held that it was not a correct statement of Hindu law to say that when a debt was contracted by one member of a joint Hindu family it was necessary for the plaintiff to show that the debt was raised for joint family purposes, but that the presumption would be the other way. Reference is made in the judgment to pp. 443 and 444 of Mayne's Hindu Law (Edn. 8) and to *Bichha Lal v.*

*Jai Pershad* (2), *Mul Chand v. Sadhu Singh* (3) and *Raghunathji Tarachand v. Bank of Bombay* (4), but I do not find in those authorities any pronouncements supporting the view that was taken by the learned Judge.

There is on the other hand an array of authorities for the contrary view. In *Ganpat Rai v. Munni Lal* (5) the rulings of the High Courts of Calcutta and Bombay were considered and the learned Judges of the Allahabad High Court followed them and held that there was no presumption that a debt contracted by the manager of a Hindu firm or family was contracted for the benefit of the firm or family. That decision was followed by Leslie Jones, J., in *Bhura v. Banarsi Das* (6).

I hold therefore that in the present case the onus was on the plaintiffs to prove that the debt was contracted by Jita Ram for the benefit of the family. The onus not having been discharged they are not entitled to a personal decree against the defendant. I accordingly dismiss the appeal with costs.

R.M./R.K. *Appeal dismissed.*

(2) [1899] 45 P. R. 1899.

(3) [1893] 59 P. R. 1893.

(4) [1910] 34 Bom. 72=2 I. C. 173.

(5) [1912] 34 All. 135=13 I. C. 84.

(6) [1915] 30 I. C. 481.

## A. I. R. 1919 Lahore 322

RATTIGAN, C. J.

*Dalipa*—Defendant—Appellant.

v.

*Labhu Ram*—Plaintiff—Respondent.

Second Appeal No. 845 of 1917.  
Decided on 31st May 1918, from order of Dist. Judge, Jullunder, D/- 20th August 1917.

Limitation Act (1908), Arts. 60, 145 and S. 10—Suit to recover money deposited, returnable on demand is governed by Art 60—S. 10 has no application—Art 145. does not apply except when the deposit is in coins which are ear-marked and when identical coins are to be returned.

Where money is sent by the plaintiff to the defendant to keep, on the understanding that it is to be returned when demanded, a suit to recover the money is governed by Art. 60, S. 10 has no application to such a suit. [P 323 C 2]

Article 145 does not apply to a deposit of money, except in the case of coins which are ear-marked and where it is the intention of the parties that the identical shall be returned to the depositor. [P 323 C 2]

*Jagan Nath*—for Appellant.

*Faqir Chand*—for Respondent.

(1) [1915] 30 I. C. 500.



**Judgment.**—According to the allegations in the plaint plaintiff, Labhu Ram, from time to time in 1907, 1908 and 1909, sent from America to his father-in-law, Bhupa, sums of money aggregating to a total of 226 dollars or Rs. 649-15-0 with the request that the money should be kept for plaintiff by way of deposit (amanat) until required by him. It is alleged that plaintiff returned from America about six years or so before suit and shortly after his return demanded the money from Bhupa. Bhupa is said to have died a year or two before suit and in 1916 plaintiff preferred the present claim against Dalipa, defendant, as the adopted son of Bhupa, for recovery of the said amount of Rs. 694-15-0. As a preliminary objection defendant urged that the claim was time-barred. The Munsif was of opinion that Art. 60, Lim. Act applied to the case and that the suit was therefore barred by time, having been instituted more than three years from the date of demand. The District Judge on appeal held that S. 10 of the Act was not applicable and that the suit was not barred and remanded the case under O. 41, R. 23, for disposal on the merits. Defendant has preferred a further appeal to this Court and I have heard Mr. Jagan Nath on his behalf and Mr. Faqir Chand on behalf of the respondents. It appears to me that the decision of the Division Bench reported as *H. H. Raja of Faridkote v. Sardar Gurdyal Singh* (1) is in point upon the question of law involved and that upon its authority I must hold that S. 10, Lim. Act has no application to the present suit. In that case the Division Bench expressly dissented from the proposition that the words in S. 10, "in trust for a specific purpose," cover cases where money is held for the benefit of the creator of a so-called trust.

"The effect of such construction (the learned Judges observe) would be that any person who entrusted money to another for his own uses could after the lapse of any time, bring a money suit against him or his representative."

"This would, in our opinion, be opposed to the principles on which the law of limitation is based. It would render a large number of the Articles of Sch. 2, Lim. Act meaningless (e. g., Arts. 60, 62, 89, 90, 98, 100, 105, 133, 134, 145) as under the section so construed suits under these Articles would not be barred by any length of time."

This authority, though opposed to the

(1) [1898] 84 P. R. 1898.

rulings of the Bombay High Court cited by the District Judge, has the support of many decisions of the other High Courts and is of course binding upon me as a single Bench. Mr. Faqir Chand argued that in any event Art. 145, Lim. Act was applicable to the present claim and cited in support of his argument *Gangahari Chakrabarti v. Nabin Chandra Banikya* (2) and *Lala Gobind Prasad v. Chairman of Patna Municipality* (3). With every respect, I cannot agree that this Article can be applied to a deposit of money, except in the case of coins which are earmarked and where it is the intention of the parties that the identical coins shall be returned to the depositor, and I prefer to follow the decision of Wallis, J., in *Balakrishnudu v. Naryansawmy Chetty* (4).

In my opinion Art. 60, Lim. Act (which is not one of the Articles included in the Schedule to the Punjab Loans Limitation Act of 1904) covers the facts of the present case. The money was sent by plaintiff and accepted by Bhupa by way of deposit and was repayable on demand. According to the plaint it was on these terms and conditions that the money was sent and as Bhupa accepted the money on those terms and conditions, he must be taken to have impliedly agreed to keep it in deposit and to repay it when required to do so. It follows that the present claim is time-barred and the suit must be dismissed. I accordingly accept the appeal and setting aside the order of the District Judge, I dismiss the suit, but under the circumstances of the case I leave the parties to bear their own costs throughout.

R.M./R.K.

*Appeal accepted.*

(2) [1916] 34 I. O. 959.

(3) [1907] 6 O. L. J. 595.

(4) A. I. R. 1914 Mad. 51=24 I. O. 852=87 Mad. 175.

## **\*\* A. I. R. 1919 Lahore 323 Full Bench**

RATTIGAN, O. J. AND CHEVIS, SCOTT-  
SMITH, LEROSSIGNOL AND  
BROADWAY, JJ.

*Mahna Singh and others—Appellants.*  
v.

*Bahadur Singh and others—Respds.*

First Appeal No. 1532 of 1915, Decided on 4th November 1918, from order of Sub-Judge, Gujranwala, D/- 15th April 1915.



**\*\* Court fees-Act (1870), S. 12—Valuation of suit for purposes of court-fee—Determination of suit to be one of particular class is open to challenge in appeal (Per Full Bench, *Chevis and Broadway JJ. Contra.*)**

By the Full Court—(*Chevis and Broadway, JJ. dissenting*) The decision of a Court as to the valuation of a suit for purposes of court-fees is final under S. 12, only as regards the actual appraisement of the suit and the determination of such questions as relate directly and immediately thereto. The question whether the Court was right or wrong in holding the suit to be one of a particular class does not relate directly or immediately to such appraisement and is open to challenge on appeal. [P 331 C 2; P 332 C 1]

If the appellate Court holds that the suit has been rightly classified by the Court of first instance, the latter Court's valuation must be upheld as final, but if the appellate Court is of opinion that the suit has been wrongly classified, the decision of the lower Court as regards valuation must necessarily be set aside, if such valuation is different from the valuation which would have to be placed on the suit if rightly classified. [P 332 C 1]

Per *Chevis and Broadway, JJ.*—When a Court determines the fee chargeable under Ch. 3, Court-fees Act, on a plaint or memorandum of appeal, the question as to the category in which the suit or appeal falls is one relating to valuation for the purposes of such determination and the decision of the Court upon that question is final for all purposes between the parties.

*B. N. Kapur and Dharam Das*—for Appellants.

*Bhagat Ram Puri and Beni Pershad Khosla*—for Respondents.

### Order of Reference

***Chevis and Broadway, JJ.***—On 1st October 1914 Mahna Singh and others, plaintiffs instituted a suit against Bahadur Singh and others, defendants, claiming possession of 1,894 kanals 8 marlas of land. Applying S. 7 (5) (b), Court-fees Act, they paid a court-fee on Rupees 3,731-14-0, being ten times the jama. The defendants pleaded that the suit had not been properly valued and that S. 7 (5) (d), Court-fees Act was applicable and court-fees payable on the market value of the land, which they alleged to be Rs. 80,000. The plaintiffs replied that the suit had been correctly valued and that in any event the market value of the land did not exceed Rs. 20,000. On 1st December 1914 the learned Subordinate Judge held that, as the revenue on the land was fluctuating, court-fee was payable on the market value and he accordingly framed the issue: "What is the market-value of the land in dispute?" A local commissioner was appointed to ascertain the market value of the land and he made his report on 6th March

1915, according to which the value of the property in suit was said to be Rupees 62,420. Both parties apparently filed objections to this report on 25th March 1915 which were however disallowed. The value of the suit was fixed at Rupees 62,420 and the plaintiffs were directed to make good the deficiency in the court-fee by 31st March 1915. The deficiency not having been made up by that date, the plaintiffs were allowed an extension of time up to 15th April 1915, on which date, as they had failed to comply with the direction of the Court, their plaint was rejected under O. 7, R. 11 (c), Civil P. C.

The plaintiffs thereupon preferred this appeal to this Court through Mr. B. N. Kapur, and Mr. Beni Parshad Khosla was heard on behalf of the defendants-respondents. That an appeal lies to this Court has not been disputed. *Mt. Sada Kaur v. Buta Singh* (1) is an authority directly in point and this question requires no further discussion. It was however contended that the decision of the Court below as to the value of the suit for the purpose of determining the court-fee payable thereon was final by virtue of S. 12, Court-fees Act, and therefore not subject to examination in appeal. On the other hand Mr. Kapur contended that S. 12 enacted finality only in the matter of the actual assessment of the valuation of the property and did not bar an appeal in which the contention was as to the nature of the suit and the section or clause applicable. In the present case it is sought to attack the order of the Court below on the ground that it erred in holding that the suit fell within the purview of Cl. (5) (d), S. 7, Court-fees Act, and if Mr. Kapur's contention is correct the soundness of this decision can be considered. In support of his contention he cited *Dada Bhau Kittur v. Nagesh Ramchandra* (2), *Lakshmi Amma v. Janamajayan Nambiar* (3), *Omrao Mirza v. Mary Jones* (4) and *Bawa Mangal Das v. Mahant Narinjan Das* (5). In *Dada Bhau Kittur v. Nagesh Ramchandra* (2) it was held that an appeal lay against the decision as to the class to which a suit belongs, although it did not lie against

(1) A. I. R. 1914 Lah. 153=25 I. C. 565=80 P. R. 1914.

(2) [1899] 23 Bom. 486.

(3) [1894] 4 M. L. J. 183 (F. B.).

(4) [1883] 12 C. L. R. 148.

(5) [1895] 56 P. R. 1895.



a decision as to the valuation of the suit in that class. *Vithal Krishna v. Balkrishna Janardan* (6) was referred to and followed as laying down the same distinction. This decision will however be referred to later.

In *Lakshmi Amma v. Janamajayan Nambiar* (3) it was held that the question as to the category to which a suit or appeal belongs is not a question the decision of which is made final by S. 12, Court-fees Act. This case proceeded on *Annamalai v. J. G. Cloete* (7), in which it was held that the terms of S. 12, Court-fees Act did not

"declare the decision of the Court in which the plaint or appeal is filed final on all questions which may arise respecting the court-fee but on every question relating to the valuation for the purpose of determining the amount of the fee."

Although neither of these two decisions was referred to a similar view was expressed in *Kanaran v. Komappan* (8), which purported to follow *Chandu v. Kombi* (9) which however scarcely appears to have laid down what the learned Judges who decided *Kanaran v. Komappan* (8) stated it did. In *Omrao Mirza v. Mary Jones* (4) it was held that S. 12, Court-fees Act, applies

"merely to the valuation of the property for the purpose of calculating the Court-fee when there is no question as to the article of the Schedule of the Act with reference to which the valuation is to be made and was not intended to apply to a case in which it is contended not that the property has been wrongly valued but that relief has been improperly estimated by putting it under a wrong article of the schedule of the Act."

In this case *Annamalai v. J. G. Cloete* (7), *Chunia v. Ram Dial* (10), *Gunga Monee Chowdhra v. Gopal Chunder Roy* (11) and *Ajodhya Pershad v. Gunga Pershad* (12) were referred and followed. All these cases support the interpretation placed on S. 12 in this decision, although no reasons appear to have been given for the view taken. In *Studd v. Mati Mahto* (13) and again in *Prokash Chandra v. Bishambhar Nath* (14), *Omrao Mirza v. Mary Jones* (4) was followed but also without any special reasons being given for the interpretation placed on S. 12.

In *Peari Shah v. Surja Mal Marwari* (15) the same view was expressed and it was held that S. 12 did not bar an appeal, because the question raised is one as to the class in which the suit falls and not merely the valuation in that class. The Madras rulings cited above as well as *Dada Bhau Kittur v. Nagesh Ramchandra* (2), *Omrao Mirza v. Mary Jones* (4) and *Studd v. Mati Mahto* (13) were cited with approval. In *Bawa Mangal Das v. Mahant Narinjan Das* (5), *Pir Mahomed v. Ghulam Hyder* (16) and *Shah Alam v. Mahmud* (17) were followed and it was held that S. 12, Court-fees Act did not bar an appeal in which the contention is not what is the valuation of the suit but rather what is its nature. The learned Judges who decided that case referred to *Lakshmi Amma v. Janamajayan Nambiar* (3) and *Vithal Krishna v. Balkrishna Janardan* (6) but apparently did not follow the latter authority.

Mr. Kapur's contention is supported by the interpretation placed on S. 12, Court-fees Act, by this Court and by the High Courts of Calcutta and Madras. It is not however clear that the Bombay High Court has taken the same view. On the other hand Mr. Beni Pershad relied on *Balkaran Rai v. Gobind Nath Tiwari* (18). This was a decision of the Full Court and in it it was held that S. 12 Court-fees Act, was on the same footing as S. 5 and that it made a decision as to the valuation for the purpose of determining the Court-fee payable in a suit final as between the parties. In this case *Muhammad Sadik v. Muhammad Jan* (19) was referred to and there *Ajodhya Pershad v. Gunga Pershad* (12) and *Annamalai v. J. G. Cloete* (7), were cited but apparently not with approval, for their Lordships remarked that:

"if we had to consider whether those sections could be reconciled or not on the lines on which those Judges proceeded, we should have a great difficulty in coming to the conclusion that a Court could determine the amount without deciding the question as to the relief sought and yet that the relief sought was not a question relating to the valuation for the determination of the Court-fee chargeable."

*Muhammad Sadik v. Muhammad Jan* (19), therefore would also appear to sup-

(6) [1886] 10 Bom. 610.

(7) [1882] 4 Mad. 204.

(8) [1891] 14 Mad. 169.

(9) [1886] 9 Mad. 208.

(10) [1875-78] 1 All. 860.

(11) [1878] 19 W. R. 214.

(12) [1880] 6 Cal. 249.

(13) [1901] 28 Cal. 884.

(14) [1910] 5 I. O. 18.

(15) [1912] 16 I. O. 575.

(16) [1874] 42 P. R. 1874.

(17) [1889] 2 P. R. 1889.

(18) [1890] 12 All. 129.

(19) [1889] 11 All. 91.



port Mr. Beni Pershad's contention. As has been stated above *Dada Bhanu Kittur v. Nagesh Ramchandra* (2) purported to follow *Vithal Krishna v. Bal Krishna Janardan* (6). In this ruling it was held by a Full Bench that on the question of whether or not any particular suit was one admitting of a valuation by the Judge an appeal lies against his decision, but that once it is found that the valuation made by him was within his proper functions his decision and the other essential elements of it are conclusive as between the parties.

The distinction drawn is not that drawn by the other High Courts and it seems to be that when it is for the Judge or Court to decide what the value of a suit is, he or it is empowered to decide (and to decide finally as between the parties) not only the actual arithmetical value but the class in which the suit falls as well as the particular clause and section of the Court-fees Act which applies to it, and that it is only when the legislature has enacted that it is for the plaintiff to fix his own valuation on the suit or has named a fixed sum as the court-fee payable on a suit that the interference of the Court is subject to examination in appeal. S. 12 (i), Court-fees Act, is as follows;

"Every question relating to valuation for the purpose of determining the amount of any fee chargeable under this chapter on a plaint or memorandum of appeal shall be decided by the Court in which such plaint or memorandum, as the case may be, is filed and such decision shall be final as between the parties to the suit."

The terms of this section are very comprehensive and it seems impossible to say that when a Court has to enter on a valuation his choice amongst the several categories of suits is not as essential an element of his valuation as the subsequent arithmetical computation by which it is completed. In the present case the plaintiffs placed a certain valuation on their suit claiming that it fell within a particular category. The defendants raised an objection that the suit did not fall within that category but within another and that the proper court-fee had not been paid thereon. Admittedly this suit is not of such a nature as would entitle the plaintiffs to fix their own valuation on it nor has the legislature declared a fixed fee as payable on such a suit. It was clearly therefore incumbent on the Court in which the plaint was filed to

come to a decision as to the valuation for the purpose of determining the amount of fee chargeable. In order to make this valuation it was necessary first to decide under which category the suit fell and it was not till this decision had been arrived at that the arithmetical computation could be made for the completion of the valuation, and the determination of the first question appears to be a question relating to valuation and as such a question on which the Court's decision is final as between the parties. This aspect of the case does not appear to have been fully considered in *Bawa Mangal Das v. Mahant Narinjan Das* (5) and *Balkaran Rai v. Gobind Kath Tewari* (18) was not referred to. The decision in *Bawa Mangal Das v. Mahant Narinjan Das* (5) appears to go too far and the more correct interpretation of S. 12 seems to be the one given in *Vithal Krishna v. Balkrishna Janardan* (6) as being more in consonance with the intention of the legislature. As however it is impossible to differentiate the former ruling of this Court from the present case it seems desirable to refer the following question to a Full Bench. Whether *Vithal Krishna v. Balkrishna Janardan* (6) or *Bawa Mangal Das v. Mahant Narinjan Das* (5) lays down the correct interpretation of S. 12, Court-fees Act.

### Opinion

**Broadway, J.**—(20th May 1918)—Mr. Badri Nath Kapur has cited certain rulings in addition to those already referred to in the order of reference. These are *Ganda Mal v. Mt. Mehtabo* (20), *Studd v. Mati Mahto* (13), *Peari Shah v. Surja Mal Marwari* (15) and *Ghasi Ram v. Har Gobind* (21). After hearing the learned counsel and considering these cases I still adhere to the opinion expressed in the order of reference and consider that the correct view is that expressed in *Vithal Krishna v. Balkrishna Janardan* (6). There are, no doubt, a number of cases in which the opposite view has been taken, but after carefully studying these decisions, I am unable to find any indication as to the reason for the view taken in them.

It seems to me that when it is for a Court to determine the amount of any fee chargeable under Chap. 3, Court-fees

(20) [1878] 67 P. R. 1878.

(21) [1906] 28 All. 411.



Act, on a plaint or memorandum of appeal, the question as to the category in which the suit or appeal falls, is one relating to valuation for the purpose of such determination quite as much as the subsequent arithmetical computation. Indeed no arithmetical computation would be possible until the question of category had been decided and therefore it seems to me somewhat difficult to avoid the conclusion that the question of category is one relating to valuation for the purpose of determining the amount of the fee chargeable on a plaint or memorandum of appeal. If the question of category does not relate to valuation, then it is a little difficult to understand to what it does relate when the decision is arrived at as a preliminary to the arithmetical computation that follows. In *Ganda Mal v. Mt. Mehtabo* (20), the point was not really discussed: *Pir Mahommed v. Ghulam Hyder* (16), *Gunga Monee Chowdhraïn v. Gopal Chundar Roy* (11) and *Chunia v. Ram Dial* (10) being referred to and followed. In *Studd v. Mati Mahto* (13) similarly former decisions were referred to and followed without any discussion. The same remark applies to *Ghasi Ram v. Har Gobind* (21). In *Peari Shah v. Surja Mal Marwari* (15) the applicability of S. 12 was to all intents and purposes avoided, inasmuch as it was held that the value had been arrived at, not for the purpose of determining the fee payable but for the purpose of arriving at the jurisdictional value of the suit—a matter which in that case was of great importance as the course of appeal depended thereon. I would be quite prepared to concede that when the inquiry as to the valuation of a suit is entered on by a Court for the purpose of determining whether it had or had not jurisdiction to deal with it, the mere fact that the decision incidentally settled the matter qua the fee chargeable as well would not debar an appellate Court from examining the correctness of the valuation for purposes of jurisdiction. But where, as in this case, the inquiry was entered on solely for the purpose of determining the fee, it seems to me that S. 12 applies. I would therefore answer the reference as above indicated.

**Scott-Smith, J.**—(28th May 1918).—The question referred to the Full Bench is whether *Vithal Krishna v. Balkrishna*

*Janardan* (6) or *Bawa Mangal Das v. Mahant Narinjan Das* (5) lays down the correct interpretation of S. 12, Court-fees Act. The Division Bench which referred the question was of opinion that the decision in *Bawa Mangal Das v. Mahant Narinjan Das* (5) appeared to go too far and that the more correct interpretation of S. 12 seemed to be the one given in *Vithal Krishna v. Balkrishna Janardan* (6). My brother Broadway who was a member of the Division Bench still adheres to the opinion expressed in the order of reference and considers that the correct view is that expressed in *Vithal Krishna v. Bal Krishna Janardan* (6) and I understand that the other member of that Bench who is a member of the Full Bench is also of the same opinion. I regret that I cannot agree with my learned brothers. In the first place, I would point out that the weight of authority is very much in favour of the view expressed in *Bawa Mangal Das v. Mahant Narinjan Das* (5). In support of the other view there is really no authority except *Vithal Krishna v. Balkrishna Janardan* (6). In *Muhammad Sadik v. Muhammad Jan* (19) the Judges no doubt said:

"We should have a great difficulty in coming to the conclusion that a Court could determine the amount without deciding the question as to the relief sought and yet that the relief sought was not a question relating to the valuation for the determination of the Court-fee chargeable."

This expression of opinion was obiter and therefore cannot be cited as authority. In *Balkaran Rai v. Gobind Nath Tiwari* (18) the Full Bench considered

"that the term 'final,' in S. 5, Court-fees Act, has precisely the same meaning as the term 'final' in S. 12 of that Act"

They referred to the authorities to the effect that the decisions within the meaning of S. 12, Court-fees Act, are appealable when such decisions are as to the category in which the suit is to be placed, but no opinion was expressed as to whether those decisions were correct or not. There is a considerable difference in the wordings of S. 5 and S. 12 of the Act. S. 5 makes a decision as to the necessity of paying a fee or the amount thereof final, whereas S. 12 makes a decision as to every question relating to valuation for the purpose of determining the amount of any fee chargeable under Chap. 3 on a plaint or memorandum of



appeal final. Had S. 12 been worded somewhat as follows :

"If any dispute arises as to the amount of any fee chargeable under this chapter on a plaint or memorandum of appeal it shall be decided by the Court in which such plaint or memorandum of appeal, as the case may be, is filed and such decision shall be final as between the parties to the suit."

I should have been prepared to hold that every decision whether as to the category in which the suit should be placed or as to the actual valuation therein would be final. It is said that as it is necessary to decide the category prior to assessing the valuation the question of category is one "relating to" valuation. I hardly follow this reasoning. I do not see how the question of the category to which a suit belongs is one relating to valuation in the strict sense. It seems to me to be an independent question antecedent but not relating to valuation. A question of category is merely what the words imply and not one relating to valuation in the category. Suits for various purposes other than the assessment of court-fee are divided in certain well-known classes, such as money suits, land suits, suits for maintenance and so on. What the Court has to do is to see to what class or category a suit belongs and after it has decided this point it has to examine S. 7, Court-fees Act, which prescribes different methods of valuation for suits of each category. The actual assessment of the value may depend upon an arithmetical calculation or upon a valuation by an expert but the question is one of fact and it is fairly obvious why the legislature might have thought proper to make the decision of such a point final. The question as to what category a suit falls into is one of law and I cannot think that the legislature intended that the decision of the trying Court on such a point should be final. It has been said that the numerous authorities which laid down that a decision on the question of category is appealable did not give any clear reasons for that decision. It seems to me probable that the reason for this is that the Courts which decided those cases thought it unnecessary to give any reasons, as having regard to the above wording of S. 12 they considered that the question as to category was not one relating to valuation in the strict sense. In *Bawa*

*Mangal Das v. Mahant Narinjan Das* (5) the following passage occurs :

"But in my opinion S. 12, Court-fees Act, should be construed as enacting finality only in the matter of the actual assessment of the valuation of the property and as allowing an appeal to proceed upon all questions of the construction of the Act, whether the contention is as to the section or clause applicable, or as to the meaning of any particular clause or section."

It was apparently thought that the question as to category though no doubt it would have to be determined first was not in itself a question relating to the actual valuation. The High Courts of Calcutta, Madras and Allahabad have taken the same view of the law as this Court took in *Bawa Mangal Das v. Mahant Narinjan Das* (5) and *Vithal Krishna v. Balkrishna Janardan* (6) is apparently the only authority which takes the contrary view. There is therefore a great deal of authority in support of the view previously taken by this Court and in this view I concur and would answer the reference accordingly.

**Chevis, J.**—(1st June 1918.)—I fully recognise that there is a considerable weight of authority in favour of the view of my learned brother Scott-Smith, but still I am unable to see how we are to hold in face of what seems to me the very clear words of S. 12, that the decision of the first Court is not final both as regards the category of suit and the final valuation. The law may be hard, but it must be administered as it stands. The Court has to value the suit for purposes of court-fee. In order to do so the first question is to determine the category. This will settle whether the fee is to be calculated on the market value or on the revenue. If on the revenue the next question is to ascertain what the revenue is. The next is all a matter of simple arithmetic. Now it seems to me that all the above questions are questions relating to valuation for the purpose of determining the fee to be charged on the plaint. If they do not relate to such valuation then to what do they relate? They must relate to something. If the question of court-fee had not arisen the lower Court need not have considered the matter at all. The question did not arise for purpose of jurisdiction.

Let us suppose a country with Deputy Commissioners of Districts and Commissioners of Divisions as in India where



income tax was levied for the first time. Suppose the legislature provided that all earned incomes should be taxed at 5 per cent and all unearned incomes at 10 per cent and that every question relating to the amount of income-tax to be paid by any individual was to be decided by the Deputy Commissioner whose decision was to be final. Then in order to determine what tax any individual should pay the Deputy Commissioner would have to decide (1) what was his income and (2) whether it was earned or unearned. The rest is mere arithmetic. Could anyone claim a right of appeal to the Commissioner against the Deputy Commissioner's decisions that his income was unearned? Not as far as I can see for the question would be one relating to the amount of tax he should pay. I would add that some of the rulings quoted go even further than holding that the first Court's decision is not final as regards the question of category, e. g., *Ghasi Ram v. Har Gobind* (21). With all due respect I submit that the result of these rulings is to make S. 12 a dead letter altogether. I think *Vithal Krishna v. Balkrishna Janardan* (6) is a perfectly correct interpretation of the law except that I would demur from the final words of that judgment which lay down that because no appeal lies the matter is open to revision. When the legislature deliberately provides that the first Court's decision is final I think the meaning is not merely that there is to be no appeal but that the decision is not open to attack in any way either by revision or appeal. As the Full Bench is divided I think the matter should be laid before the Full Court if the learned Chief Judge approves.

### Judgment of Full Court

**Rattigan, C. J.**—(29th October 1918).

—The facts of the case are stated fully in the order of the Division Bench (Chevis and Broadway, JJ.), dated 19th March 1918 and the question referred by that Bench to the Full Bench was:

"whether *Vithal Krishna v. Balkrishna Janardan* (6) or *Bawa Mangal Das v. Mahant Narinjan Das* (5) lays down the correct interpretation of S. 12, Court-fees Act, 1870.

The Full Bench which sat to decide this question comprised the Judges who had made the reference and Scott-Smith, J., but the learned Judges were unable to agree upon the answer to be given to the

question before them Chevis and Broadway, JJ., being of the opinion that when the Court determines the fee chargeable under Ch. 3, Court-fees Act, on a plaint or memorandum of appeal the question as to the category in which the suit or appeal falls is one relating to valuation for the purposes of such determination and that the decision of the Court upon that question is final for all purposes between the parties, Scott-Smith, J., on the other hand holding that upon the weight of the authorities as well as upon the true construction of the words of S. 12 of the Act, the decision of a Court when determining the valuation of a suit for the purposes of the section is open to appeal in so far as it decides the category in which the suit is to be placed and is final only as to the valuation of the suit if the decision upon the other question is correct. In consequence of this difference of opinion and in view of the fact that *Bawa Mangal Das v. Mahant Narinjan Das* (5) had been decided by two Judges of this Court it was deemed advisable to refer the question of law involved to a Full Court for determination. The question has now been argued at length before the Full Court and the authorities bearing on the subject are all referred to in the judgments of the three Judges who constituted the Full Bench. It is admitted that the authorities which support the opinion of Scott-Smith, J., are numerous and represent the opinions of various learned Judges of the different High Courts and of this Court. These authorities are practically unanimous and the only direct decision per contra is that reported as *Vithal Krishna v. Balkrishna Janardan* (6).

Before proceeding I might here observe that the last-mentioned decision is not altogether self-consistent and further that the view there taken that an order of a Court, though not open to challenge on appeal, may yet be revised by the High Court, has not been accepted by Chevis, J., who otherwise follows that authority. So far then as authority goes, the question before us would appear to be no longer open to doubt and I confess that in such circumstances I am reluctant to take a view contrary to that which has received the approval at different times and in different Courts of a large number of learned Judges. It is urged, no doubt,



that none of these authorities gives "reasons" for the decision arrived at and that consequently their value is considerably lessened. This argument does no commend itself to me, as I have no reason to doubt that these decisions were given only after full consideration of the words used by the legislature in S. 12 of the Act.

The preponderating weight of the authorities being thus in favour of the correctness of the decision in *Bawa Mangal Das v. Mahant Narinjan Das* (5), the question remains whether apart from those authorities the view taken by Chevis and Broadway, JJ., or that taken by Scott Smith J., is correct? After giving every consideration to the arguments addressed to us and to the reasons given by the learned Judges in support of their respective views, I find myself in entire agreement with the opinion expressed by Scott-Smith, J. It must be remembered that the words which we have to construe occur in a fiscal enactment and in a section which is in many respects almost penal in its character. They must therefore be construed strictly and must not be allowed wider scope than their strict literal meaning warrants: see *Anonymous* case (22), *Daya Chand v. Hemchand* (23) and *Port Canning Land Co., In re* (24). The words "every question relating to valuation" must therefore be taken to mean every question directly and immediately relating to valuation, or, in other words, to the appraisalment of, or fixation of value upon, any particular plaint or memorandum of appeal. Now before a Court can decide what is the actual value for purposes of court-fee of a plaint or memorandum of appeal, it must obviously have regard to the nature of the suit or appeal before it, and decide under what category or class that suit falls, that is to say, it must decide what sort of suit or appeal it is and upon what lines the Court should proceed to value the suit, or appeal, and when it has decided these points with reference to S. 7, and its various clauses, it has then to proceed to decide what is the actual value of the plaint or memorandum before it. I cannot agree that the first question is one directly relating to valuation simply because it is one

which a Court must necessarily decide before it can place a value on the suit or appeal. It appears to me a question standing by itself and antecedent, as Scott Smith, J., expresses it, to the determination of the actual value. To take an illustration. Suppose the legislature to enact a rule to the effect that

"every question of necessity in respect of an alienation shall be deemed to be a question of fact and the decision thereon of the Court of the first instance shall be final."

In a suit between A and B, A sues for a declaration that a sale effected by X, his father, in favour of B is not binding upon his reversionary rights inasmuch as the sale was effected for unnecessary purposes. B pleads that A and X are Mahomedans and bound by Mahomedan law and do not follow custom and that therefore no question of necessity arises. The Court proceeds to determine the question whether custom or Mahomedan law is applicable, and finding that custom applies, proceeds to dispose of the plea of necessity and holds that no necessity is proved. Now in a case such as this, before the Court can decide the question whether there was or was not "necessity" it must obviously determine whether the parties are bound by custom or Mahomedan law. But I cannot believe that its finding with respect to this question would be held to be final, simply because the legislature had enacted that its finding on the question of necessity is to be regarded as final.

In the case before us, if we were to hold that the decision of the Court as to the category or class in which a particular suit or appeal falls is to be final between the parties as provided in S. 12 of the Act, no matter how absurd or erroneous such decision might be, anomalous results would follow. For example an owner of a house sues to recover the same from the defendant, whom he alleges to be trespasser. The Court quite erroneously holds that the suit is one falling under Cl. (11), S. 7 of the Act; in other words, a suit between landlord and tenant, and that the court-fee chargeable is according to the amount of rent payable for the year next to the date of presenting the plaint. This decision is palpably wrong, but if the plaintiff refuses to pay the court-fee as estimated, his plaint will be rejected, and if he files an appeal, upon the view

(22) [1884] 10 Cal, 274.

(23) [1879-80] 4 Bom. 515.

(24) [1871] 16 W. R. 208.



taken in *Vithal Krishna v. Balkrishna Janardan* (6), he cannot challenge the decision of Court upon a matter which is vitally important to himself, quite irrespective of the question of the amount to be paid as Court-fee. The result then is that as a consequence of a palpably wrong decision the plaintiff must in law be taken to be the landlord of the defendant, a position contemplated neither by himself nor by the defendant. This is, of course, an extreme case, but I refer to it as illustrating possibilities which could not have been contemplated by the legislature. In answer to this it is argued that in any event there may well be cases of great hardship to plaintiff, who is compelled to pay a very large sum of money on court-fee by a Court which has erroneously, but finally, decided the value of the plaintiff's suit. This may be so, but I cannot see that, because hardships of one kind may occur, we are justified in doubling the possibilities of hardships by creating others of an entirely different character.

Nor, with every respect, am I able to appreciate the argument that the legislature could not have intended to make merely the appraisal of the suit final because, once the suit has been held to fall within a particular category or class, such appraisal is only a matter of arithmetical calculation. No doubt, this may be so in many cases, but in many others the Court, even after it has held the suit to be one of a particular class, has to decide questions which are immediately relevant to the question of valuation, but which are in no sense merely matters of arithmetical calculation. It may, for example, have to determine the market-value of the property in suit: S. 7, Cls. 3 and 5 (d) and (e); or the amount of land revenue assessed on the land in suit: S. 7, Cl. 5 (a), (b) and (c); or in some cases the value of land similar to the land in suit in the neighbourhood: S. 7, Cl. 5 (e); or in the case of an award, the actual amount or value of the property in suit: S. 7, Cl. 10 (d). Again, in certain cases it may be necessary for the Court to issue a commission for inquiry as to annual net profits or the market-value of the land, house or garden in suit: (S. 9). In all such cases, the matters referred to are immediately relevant to the appraisal-

(25) [1894] 4 M. L. J. 110.

ment of the property in suit; they are all questions of fact and their determination, though it may occasionally necessitate elaborate inquiry, is presumably within the competence of a Court of first instance. The legislature has therefore thought fit to make the decision of the Court thereon final. But the question whether a particular suit falls within a specified category or class is not in itself immediately relative to the question of its valuation, and is often one of law involving points of such nicety and difficulty that the High Courts are in many cases not agreed as to the category in which a suit should fall. If, for instance, a plaintiff is himself in joint possession of joint family property and prays for a declaration and separate possession, does his suit fall within Cl. (4) (b), S. 7 of the Act, *Reference under Court-fees Act*, S. 5 (5) or under Art. 17 (3) of the Sch. 2 to the Act, *Kirty Churn v. Aunath Nath* (26) and *Mohendra Chandra v. Ashutosh Ganguli* (27)? Again, if A prefers an objection in execution proceedings to the attachment of certain property and upon the rejection of his objection, brings a regular suit to establish his right to the property and for removal of the attachment, is his suit for purposes of court-fee, to be deemed one under Art. 17 (i), Sch. 3, to the Act, *Dayachand v. Hemchand* (23), *Dhondo Sakharam v. Govind Babaji* (28), *Vithal Krishna v. Balkrishna Janardan* (6) and *Moti Singh v. Kaunsilla* (29), or under S. 7, Cl. 4 (c) of the Act, *Ram Prasad v. Sukh Dai* (30), *Karam-ud-din v. Jaswant Singh* (31), *Ahmed Mirza v. Thomas* (32) and *Fulkumari v. Ghanshyam Misra* (33)?

I cannot believe that it was the intention of the legislature to affix finality to the determination of difficult questions of law of this kind by a Court of first instance, nor can I read the words of S. 12 of the Act as necessitating such a conclusion. It seems to me that the decision of the Court is final under S. 12 only as regards the actual appraisal of the suit and the determination of such questions

(26) [1882] 8 Cal. 757.

(27) [1893] 20 Cal. 762.

(28) [1885] 9 Bom. 20.

(29) [1894] 16 All. 303.

(30) [1878-80] 2 All. 720 (F.B.).

(31) [1886] 80 P. R. 1886.

(32) [1886] 13 Cal. 162.

(33) [1904] 31 Cal. 511.



as relate directly and immediately thereto, and that the question whether such Court was right or wrong in holding the suit to be one of a particular class does not relate directly or immediately to such appraisement and is open to challenge on appeal. If the appellate Court holds that the suit has been rightly classified by the Court of first instance, the latter Court's valuation must, of course, be upheld as final; but if, on the other hand, the appellate Court is of opinion that the suit has been wrongly classified, the decision of the lower Court as regards valuation must necessarily be set aside, if such valuation is different from the valuation which would have to be placed on the suit if rightly classified. For the reasons given, I am of opinion that *Bawa Mangal Das v. Mahant Narinjan Das* (5) lays down a correct rule of law and should be followed.

**Chevis, J.** — (30th October, 1918).—I have carefully considered the judgment of the learned Chief Judge, but I regret to say that I am unable to alter my former opinion. While freely admitting that such a section as S. 12 must be construed strictly and must not be allowed a wider scope than the strict literal meaning of the words warrants, I still think that we have no right to cut down the scope of the section below that which is indicated by the wording. The section, in my opinion, covers every question which is one relating to valuation and not merely such questions as directly and immediately relate to valuation. As I have already said in my order of 1st June last, I regard the question of category as one relating to valuation, for it must relate to something, and if it does not relate to valuation I am at a loss to say to what it does relate. For had not the question of valuation arisen, the question of category would not have arisen. Whether a particular question arises at all in the case may, I should say, be a question open to attack on appeal, but when there is no doubt (as in the present case) that the question does arise, then I conceive the decision of the Court on that question is final if the question relates in any way to valuation. With the greatest respect for the numerous authorities and the opinion of the learned Chief Judge, I find myself constrained to adhere to my former opinion.

**Scott-Smith, J.** — (31st October 1918).—

I have read and considered carefully the judgments of the learned Chief Judge and Chevis, J. I agree entirely with the former and have nothing to add to the opinion delivered by me as a member of the Full Bench on 28th May 1918.

**LeRossignol, J.** — (1st November 1918).—I have read the foregoing expressions of opinion and agree without hesitation with the views expressed by the learned Chief Judge. "Valuation" in S. 12, Court-fees Act, must be interpreted in its ordinary meaning which is "appraisement" and every question of appraisement is finally decided by the first Court. Appraisement is a matter of fact or fiction, but the category to which the suit appertains is a matter of law.

**Broadway, J.** — (4th November 1918).—I have had the advantage of reading the opinions of the learned Chief Judge and the other Judges comprising the Full Court but after careful consideration I regret that I am unable to alter my former views, although I admit that it is with some hesitation that I venture to adhere to my former opinion.

R.M./R.K. Order accordingly.

## A. I. R. 1919 Lahore 332

RATTIGAN, C. J.

*Mt Diali*—Plaintiff — Appellant.

v.

*Kala Singh and others*—Defendants—Respondents.

Second Appeal No. 1898 of 1917, Decided on 16th May 1918, from decree of Dist. Judge, Jullunder, D/- 18th May 1917.

**Punjab Land Revenue Act (17 of 1887), S. 158 (2) (xvii)**—Suit for declaration of right to partition — Civil Court has jurisdiction—Question whether partition should or should not be allowed is question for determination by Revenue Court.

A civil Court has jurisdiction to entertain and decide a suit for a declaration that the plaintiff is entitled to have certain land partitioned: 82 P. R. 1898 (F.B.), *Foll.* [P 333 C 1]

Where therefore plaintiff sued for a declaration that she was entitled as the widow of A to have the land jointly held by her and defendants partitioned.

**Held**: that her suit was maintainable in a civil Court, which would merely decide whether or not the plaintiff had a legal right to claim partition, and it would be a question solely for the revenue authorities to decide whether partition should or should not be allowed. [P 333 C 1]

*Tek Chand*—for Appellant.

*Badraddin Kureshi*—for Respondents.



**Judgment.**—Mt. Diali applied to the revenue authorities for partition of a joint holding but her application was refused, the revenue officer stating in his order that he had induced the woman to agree to accept maintenance in lieu of having the land partitioned. She thereafter brought a suit in the civil Court for a declaration that she was entitled, as the widow of Atra, to have the land, jointly held by her and defendants, partitioned. She was granted a decree by the Munsif, but the District Judge on appeal has held that the lower Court had no jurisdiction to try the suit which was barred under S. 158 (2) (xvii), Punjab Land Revenue Act of 1887. The learned Judge was of opinion that in the present case no question of title was involved and that the only question was whether the widow had a right to have her share divided off, and this he held to be the question solely within the cognizance of the revenue authorities.

It appears to me that the learned Judge has overlooked the ruling of the Full Bench of this Court reported as *Buta v. Mt. Jiwani* (1) and upon the authority of that ruling which is, I think, equally applicable to the present case, though this is the converse of the case actually before the Full Bench, I hold that the civil Courts had jurisdiction to entertain and decide this suit as framed. I need hardly add that the civil Courts will merely decide whether or not the plaintiff has a legal right to claim partition and that it will be a question solely for the revenue authorities to decide thereafter, if such a decision becomes necessary, whether partition should or should not be allowed. I accordingly accept the appeal, and setting aside the order of the District Judge remand the case under O. 41, R. 23, Civil P. C., to him for decision of the appeal on the merits. Costs will abide the event.

R.M./R.K.

*Appeal accepted.*

(1) [1898] 82 P. R. 1898 (F.B.).

**A. I. R. 1919 Lahore 333**

SHADI LAL, J.

*Sunder*—Convict—Petitioner.

v.

*Emperor*—Opposite Party.

Criminal Revn. Petn. No. 1352 of 1918, Decided on 15th February 1919, from order of Sess. Judge, Attock D/- 29th November 1918.

Penal Code (1860), Ss. 442 and 451—**Building or house illustrated.**

A courtyard partly surrounded on the front by a mud wall with no roof over it nor any door or gateway is not a building or house within the purview of S. 442. [P 333 C 2]

*Nand Lal*—for Petitioner.*Sunder Das*—for the Crown.

**Judgment.**—The petitioner has been convicted of having committed house trespass in order to the committing of an offence punishable with imprisonment and has been sentenced under S. 451, I. P. C., to six months' rigorous imprisonment. Now, a perusal of the plan and the evidence on the record makes it absolutely clear that the place, where the woman, Mt. Nur Bhari, was sleeping, is a courtyard outside her house; and I do not think that this courtyard can be regarded as a house or a building used as a human dwelling. This is the view taken by the Bombay High Court in *Queen-Empress v. Rama* (1). The same point is discussed at p. 2058 of Gour's Penal Law of India, Vol. 2, Edn. 2, where the learned author points out that a compound or enclosure is not a building or a house within the purview of the section. It is to be observed that though the courtyard is partly surrounded on the front by a mud wall, that wall does not surround the whole front of the courtyard. Further there is neither a roof over the courtyard, nor a door or gateway leading into the street. The courtyard is in many respects similar to the enclosure dealt with in *Kohmi v. Emperor* (2).

Accordingly I hold that an essential ingredient of the offence of house trespass has not been established, and it is unnecessary to discuss the case on the merits. I must however say that there is considerable force in the contention of the learned counsel for the petitioner that the accused was beaten by the woman's husband and his relatives when he demanded his debt; and that this case was brought in order to avoid the consequences of the assault made on the petitioner. The woman herself admits that her husband owed some money to the petitioner, and this fact has been overlooked by the learned Sessions Judge. Further no sort of explanation has been offered to account for the injuries which

(1) Rat. Unrep. Cr. Cas. 484.

(2) A. I. R. 1914 Lah. 584=26 I. C. 305=24 P. R. 1914 Cr.



were found on the person of the petitioner on 23rd August 1918 when he made a complaint to the Magistrate. There is however no need to pursue this subject any further because the case for the prosecution must fail on the ground that the courtyard is not a house or a dwelling. I accept the application for revision, and setting aside the conviction direct that the petitioner be discharged from his bail-bond.

R.M./R.K.

*Petition allowed.***A. I. R. 1919 Lahore 334**

MARTINEAU, J.

*Makhan Singh*—Plaintiff—Appellant.  
v.

*Baisakhi Ram Shah* — Defendant — Respondent.

Second Appeal No. 3029 of 1918. Decided on 24th February 1919, from decree of Dist. Judge, Sialkot, D/- 26th August 1918.

(a) Evidence Act (1872), S. 116—Tenant in possession even after expiration of tenancy cannot deny landlord's title.

A tenant in possession cannot, even after the expiration of his tenancy, deny his landlord's title without actually and openly surrendering possession to him: 35 *I. C.* 7; 38 *All.* 226 and 37 *All.* 557 (*P. C.*), *Foll.* [P 335 C 1]

(b) Evidence Act (1872), S. 116—Tenant executing lease but not let in possession by lessor—In absence of his ignorance of lessor's title, or of evidence to prove that his execution of lease was obtained by fraud, etc., he is estopped from denying his lessor's title.

A tenant who has executed a lease but has not been let in possession by the lessor, is estopped from denying his lessor's title in the absence of proof that he executed the lease in ignorance of the defect in his lessor's title or that his execution of the lease was procured by fraud, misrepresentation or coercion: 7 *C. W. N.* 596, *Foll.* [P 335 C 2]

Plaintiff sued for ejectment of defendant from a shop and for recovery of rent on the basis of a lease executed by defendant in favour of plaintiff on 30th July 1915. It appeared that the defendant had executed leases in respect of the same shop in favour of the plaintiff's father *D.*, one on 18th February 1914 and one on 7th July 1916. The defendant pleaded that *D.* was the real owner of the shop and that he had been induced by fraud to execute the deed in favour of the plaintiff:

*Held:* (1) that the defendant not having surrendered possession of the shop was estopped from denying the plaintiff's title; (2) that he was not entitled to show that the plaintiff was a benamidar acting as an agent of *D.* [P 335 C 2]

*Tek Chand* and *Charat Singh* — for Appellants.

*D. C. Ralli*—for Respondent.

**Judgment.**—The present suit was brought by Makhan Singh for the ejectment of the defendant Baisakhi Shah

from a shop and for Rs. 93-8-0, arrears of rent, on the basis of a lease executed by the defendant in favour of the plaintiff on 30th July 1915. The lease recited that the shop belonged to the plaintiff. It was for a period of one year commencing from 15th September 1915, and the rent payable was Rs. 11 a month. The defendant made some payments of rent which were endorsed on the lease. Then the plaintiff sued him for rent and got a decree for Rs. 15-15-3 on 23rd May 1916. He again sued and got a decree for Rs. 22-14-9 on 5th July 1916. Finally he brought the present suit on 12th March 1917. Besides the lease of 30th July 1915 in favour of the plaintiff two leases were executed by the defendant, in respect of the same shop, in favour of the plaintiff's father Dial Singh, one on 18th February 1914 and one on 7th July 1916. The defendant pleaded that Dial Singh was the owner of the shop, and that he had been induced by fraud to execute the deed in favour of the plaintiff. Dial Singh was added by the Munsif as a defendant and the Munsif found that the plaintiff had no title to the shop and no right to the rent, and dismissed the suit. On appeal the District Judge (Mr. Barker) held that Dial Singh had been wrongly impleaded, with the result that the suit had degenerated into a contest as to title between the plaintiff and his father; and that the true issue had thus been obscured. He remanded the case for a fresh decision, directing that the name of the plaintiff's father should be struck off the record.

The Munsif again dismissed the suit, holding that S. 116, Evidence Act, did not preclude the defendant from denying the plaintiff's title after the expiry of the lease, that the plaintiff had not shown that the shop had been re-let to the defendant after the expiry of the year, and that the partition, in which the plaintiff alleged that the shop had fallen to his share, had not been proved. The District Judge (Rai Sahib Lala Diwan Chand) has dismissed the plaintiff's appeal. He holds that a tenant can deny the title of a landlord who has not put him into possession of the property, and referring to the leases executed in favour of the plaintiff and Dial Singh he says:

"The leases were recorded without determination of either of the tenancies, and in such a case it will still have to be determined as to who was the real landlord."



He then goes into the question of title and finds that no partition took place between the plaintiff and Dial Singh, and that the former merely acted as an agent of his father, who was the real proprietor of the shop. The plaintiff has appealed to this Court, contending that the defendant is estopped from denying his title. It is argued for the defendant that it is only during the continuance of the tenancy that a tenant is estopped under S. 116, Evidence Act, from denying his landlord's title, and that as the lease in suit expired on 15th September 1916, the defendant can be permitted to deny the plaintiff's title after that date. Reference has been made to *Kantheppa Raddi v. Sheshappa* (1), *Chandri v. Daji Bhau* (2), *Vadapalli Narasimham v. Dronam-  
raju. Seetharamamurthy* (3) and *Ram Chandra Singh v. Bhikhambar Singh* (4) and to S. 111 (a), T. P. Act. These are authorities for holding that on the expiry of the term of the lease the tenancy ceases and the tenant's possession becomes wrongful, and the rulings cited are not inapplicable merely because the point arose in them only in connection with the question of limitation. But the cessation of the tenancy is not sufficient to put an end to the estoppel.

It is stated on p. 800 of Woodroffe and Ameer Ali's Evidence Act, Edn. 6, that it is well settled that a tenant in possession cannot even after the expiration of his lease deny his landlord's title without actually and openly surrendering possession to him, and this is the view taken by the Calcutta High Court in *Bhaiganti Bewa v. Himma Bidyakar* (5), in which it was held that Ss. 115, 116 and 117, Evidence Act are not exhaustive, and that a person who has been let into possession as tenant is estopped from denying his lessor's title even after the expiration of the tenancy without first surrendering possession. Similarly in *Ganpat Rai v. Multan* (6) it was held that the disability is not removed by the cessation of the tenancy, and the matter is concluded by the judgment of the Privy Council reported as

*Mt. Bilas Kunwar v. Desraj Ranjit Singh* (7). In the latter case, although the lease was not for a fixed term, it had determined under S. 111 (b), T. P. Act, by the tenant having received a notice to quit, but it was held nevertheless that the tenant could not deny his landlord's title without having openly surrendered possession to the landlord.

The next question is whether the lower appellate Court is right in holding that as the defendant was not put into possession of the shop by the plaintiff, but was already in possession under the lease executed in favour of Dial Singh, the rule of estoppel does not apply. A contrary view has been taken by a Full Bench of the Madras High Court in *Venkata Chetty v. Aiyanna Gounden* (8), in which it has been held, following *Ketu Das v. Surendra Nath Sinha* (9), that a tenant who has executed a lease, but has not been let into possession by the lessor, is estopped from denying his lessor's title, in the absence of proof that he executed the lease in ignorance of the defect in his lessor's title, or that his execution of the lease was procured by fraud, misrepresentation or coercion. I see no reason for not following that authority. There is no proof that the defendant was unaware of the defect in the plaintiff's title when he executed the lease in suit. On the contrary, the fact of his having previously executed a lease in favour of Dial Singh would show that he was not in any ignorance in regard to the title to the property. There is also no proof of any fraud, misrepresentation or coercion. Lastly it is contended for the defendant that he is entitled to show that the plaintiff, in whose favour he executed the lease in suit, was a benamidar acting as an agent of Dial Singh. There is however a ruling of this Court, *Bogar v. Karam Singh* (10), against that contention. I hold therefore that although the term of the lease has expired the defendant, not having surrendered possession of the shop to the plaintiff, is estopped from denying the latter's title. The defendant does not allege that he has paid to the plaintiff any portion of the rent claimed. The plaintiff is consequently entitled to the decree asked for.

(1) [1898] 22 Bom. 893.

(2) [1900] 24 Bom. 504.

(3) [1908] 81 Mad 168.

(4) [1910] 87 Cal 674=6 I. O. 889.

(5) [1916] 85 I. O. 7.

(6) [1916] 88 All. 226=93 I. O. 97.

(7) A. I. R. 1915 P. O. 96=37 All. 557=30 I. O. 299=42 I. A. 202 (P. O.).

(8) [1917] 40 Mad. 561=86 I. O. 817.

(9) [1908] 7 O. W. N. 596.

(10) [1906] 141 P. R. 1906.



I accept the appeal and give the plaintiff a decree against the defendant for Rs. 93-8-0 on account of rent, and for the ejectment of the defendant from the shop in dispute with costs throughout.

R.M./R.K.

*Appeal accepted.*

### A. I. R. 1919 Lahore 336

SCOTT-SIMTH AND MARTINEAU, JJ.

*Maula Dad*—Defendant—Appellant.

v.

*Mt. Begam*—Plaintiff—Respondent.

Second Appeal No. 2768 of 1915, Decided on 10th May 1919, from decree of District Judge, Jhelum, D/- 12th June 1915.

(a) Civil P. C. (1908), O. 41, R. 31,—No consideration of evidence—Judgment should be set aside.

It is the duty of the appellate Court to consider the evidence on the record and where this is not done, the judgment is liable to be set aside in second appeal. [P 337 C 1]

(b) Practice—New case—Court cannot set up.

A Court of Appeal cannot set up a case for any of the parties which is not put forward in the pleadings. [P 337 C 1]

*Muhammad Shafi*—for Appellant.

*Fazal-i-Hussain*—for Respondent.

**Judgment.**—In the suit out of which the present appeal arises *Mt. Begam*, the plaintiff, the sole surviving member of a family of prostitutes living in the town of Gujrat, sued for possession of certain property sold by *Mt. Bakht Bhari*, her aunt, to *Choudhari Maula Dad*, defendant-appellant, on 6th February 1914, on the ground that the property was acquired with the earnings of *Mt. Jhandi*, another aunt, and out of the property left by *Mt. Shado*, her grandmother, though the sale-deeds were executed in the name of *Mt. Bakht Bhari*. The title deeds being in the name of *Mt. Bhakht Bhari* and the land having been entered in her name in the revenue records, the onus is clearly upon the plaintiff to show that *Mt. Bhakht Bhari* was really only a benamidar and not the actual owner of the property. The first Court rightly laid the onus of proving the third issue:

"Did *Mt. Bakht Bhari* acquire the property in dispute with the earnings of *Mt. Jhandi*?" upon the plaintiff, and found that the property was not acquired with the earnings of *Mt. Jhandi* but was acquired by *Mt. Bakht Bhari* herself out of the earnings of her two daughters, *Mt. Piranditti* and *Mt. Udmi*, who were wellknown

singers and dancers and earned large sums of money from their trade as such. It accordingly dismissed the plaintiff's suit. The lower appellate Court reversed this decision, saying that it was on the whole satisfied that the land was bought with money contributed by *Mt. Jhandi* and *Mt. Begam*, possibly with the help of the two girls, i. e., the daughters of *Mt. Bakht Bhari*, but probably without their help. It held that the property was therefore family property which *Mt. Bakht Bhari* had no power to sell and it decreed the plaintiff's claim. The vendee *Chaudhari Maula Dad*, has filed a second appeal to this Court and *Mr. Shafi* has strenuously urged on his behalf that the lower appellate Court has set up a new case for the plaintiff which was never raised by her and that the findings recorded by it are not based upon the evidence on the record. Now turning to the plaint, we find it clearly alleged therein that the property in suit was acquired with the earnings of *Mt. Jhandi* and with the property left by *Mt. Shado*. The lower appellate Court at the commencement of its judgment says that the suit was brought on the ground that the land is part of the family estate of *Mt. Shado's* children. This however was not the allegation in the plaint. The lower appellate Court was also wrong in stating the plaintiff's assertion to be that the land was acquired by the family with the earnings of *Mt. Jhandi* and *Mt. Begam* herself. *Mt. Begam* neither in the plaint nor in her oral statement said that any of the purchase money was contributed by herself. In discussing the findings of the Subordinate Judge to the effect that the land was acquired by the prostitution of *Mt. Bakht Bhari's* daughters the learned District Judge says:

"There is considerable doubt as to this, because both these girls married respectable men early in life and it is not therefore very likely that they earned large sums by prostitution."

Further on he says:

"I think the probabilities are that they (i. e., *Mt. Bakht Bhari's* daughters) remained perfectly respectable and did not amass wealth by prostitution."

Now evidence was produced to the effect that *Mt. Bakht Bhari's* daughters were famous singers and dancers and acquired sums of money which they handed over to their mother with which she purchased the land in suit. A local commissioner was also appointed whose find-



ing is to the same effect. The learned District Judge has not referred to any of the evidence or to the report of the local commissioner and after a careful consideration of his judgment we are unable to say whether he has duly considered this evidence or not. His judgment in fact deals more with generalities than with the actual evidence on the record.

It is admitted that the plaintiff's son purchased a house from Mt. Bakht Bhari, which would seem to show that she had some separate property of her own of which the plaintiff's family admitted her to be the owner. This fact has not been referred to by the learned District Judge. In finding that the purchase money was supplied by Mt. Jhandi and Mt. Begam possibly with some help from the daughters of Mt. Bakht Bhari but probably without such help, the learned District Judge has set up a case for the plaintiff which was not put forward by her in her pleadings and is apparently not borne out by any evidence on the record. We do not think it was open to the Court below to set up a new case for the plaintiff in this manner and as we are not sure whether it considered the evidence produced by the parties, we have no option but to remand the case for re-decision. We accordingly accept the appeal and setting aside the order of the lower appellate Court remand the case thereto under O. 41, R. 23, Civil P. C., for re-decision on the merits. Stamp in this Court will be refunded and other costs will be costs in the cause.

R.M./R.K.

*Appeal accepted.***A. I. R. 1919 Lahore 337**

BEVAN-PETMAN, J

*Diwan Chand—Appellant.*

v.

*Bedha Ram Devi Dial—Respondent.*

Misc. Second Appeal No. 1623 of 1918. Decided on 14th May 1919, from order of Senior Sub-Judge, Lyallpur, D/- 18th February 1918.

**Decree — Execution — Court held not justified in striking off application — It should have dismissed it or adjourned it — Application consigned to record room cannot be held to be dismissed — Order of release of goods from attachment implies dismissal of application for execution — When judgment-debtor is party to disappearance of property decree-holder held entitled to execute decree by his arrest.**

In execution of a decree the decree-holder attached certain property of the judgment-debtor

and the same was made over to a sapurdar. Certain attempts at sale proving abortive, the bailiff reported on 1st May 1916 that the sapurdar had left and the goods were in possession of the judgment-debtor who however presented a written statement denying that he was in possession. Owing to the non-attendance of parties, the execution proceedings were consigned to the record room on 7th June 1916. A year later, the decree holder made a fresh application for execution on 27th July 1917 and a specific order was recorded that the goods were released and the application was again consigned to the record room. In November 1917 the decree-holder applied for execution by the arrest of the judgment-debtor.

*Held:* (1) that the Court was not justified in "striking off" the application for execution on 7th June 1916, which should either have been dismissed or adjourned, as the Court was not legally competent to do anything else; (2) that it must be held that the application was not dismissed and that the attachment continued to subsist; (3) that the order of release must be regarded as one involving and implying the dismissal of the second application and that that application should be held as having been dismissed; (4) that consequently, the attachment ceased on 27th July 1917 and the goods were thereafter at the disposal of the judgment-debtor; (5) that in any event the judgment-debtor was a party to the disappearance of the property and the decree-holder was entitled to execute the decree by the arrest of the judgment-debtor.

[F 339 C 1]

*Ram Chand Manchanda—*for Appellant.

*Mukand Lal Puri—*for Respondent.

**Judgment.**—The respondent, the decree holder, obtained a decree against the appellant, the judgment-debtor, and in execution of the decree he attached certain property of the latter and the same was made over to a sapurdar, or care-taker, who gave the usual receipt and undertaking. It is a very common practice in such cases for the goods seized to remain in possession of the judgment-debtor. Certain attempts at sale proving abortive, the bailiff reported on 1st May 1916 that the care-taker had left the town and that the goods were in the possession of the judgment-debtor who was responsible for the failure. The judgment-debtor however presented a written statement in Court denying that he was in possession and suggesting collusion between the decree-holder and the care-taker, and the execution proceedings were consigned to the record room on 7th June 1916 owing to the non-attendance of the parties. A year later the decree-holder made a fresh application for execution of the decree. On 27th July 1917, owing to the absence



of the decree-holder, a specific order was recorded that the goods were released, and the application was again consigned to the record room. In each of the orders the Munsif uses the words "dakhil daftar." In November 1917 the decree-holder applied for execution of the decree by the arrest of the judgment-debtor. The Munsif wrote a very confused order, but he issued a warrant for the arrest of the judgment-debtor on the ground that the property had been released.

On appeal the lower appellate Court held that no attachment subsisted after the first application for execution had been dismissed in default, that *Bhana Mal v. Ganpat Rai* (1), relied on by the judgment-debtor, was inapplicable, inasmuch as the property had not been released in that case, and that the judgment-debtor had his remedy against the care-taker and he therefore dismissed the appeal. The care-taker is alleged to be a man of straw and to have disappeared. The judgment-debtor appeals to this Court and on his behalf it is argued that the report of the bailiff is not evidence, that there is no evidence on the record to show that the goods remained in his possession, that the mere dismissal of the applications for execution and the specific order of release did not in fact release them, that nothing was done to give effect to the order of release, that the judgment-debtor never recovered the goods, that they must be regarded as still actually seized and in the possession of the care-taker and that the principles enunciated in *Bhana Mal v. Ganpat Rai* (1) were applicable to the case. No other authorities have been referred to. It is convenient to give the following extract from the judgment relied on, which is of a Division Bench of the Chief Court:

"In Chitty's Archbold's Practice of the Queen Bench Division Edn. 14, Ch. 75, 16 and 17 (p. 869) authorities are cited for the following rules: as soon as the Sheriff seizes the debtor's goods under the writ he is thereby absolutely discharged to the extent of the levy, whether the Sheriff sell the goods or return the writ or not; or though they afterwards be rescued from him; and the debtor may plead this to an action on the judgment, or if another writ be sued out against him for the same debt, he may be relieved upon motion. The Sheriff is liable to the execution creditor for the amount of the levy. Applying these rules our answer to the second question is that the decree-holder cannot further execute his decree against the person or

property of the judgment-debtor, other than that attached and made over to the care-taker unless it be proved that the judgment-debtor was a party to the disappearance of the property attached."

On behalf of the respondent it is contended that the goods were released, that thereafter the decree-holder could not demand their sale or otherwise put forward any right or claim in respect of them without fresh execution and attachment, that till he did so, he was in no way concerned with the goods, that on the contrary the goods having been released the care-taker was no longer entitled to possession of them and was relieved of all obligation except to return them to the judgment-debtor if they were not in the latter's possession already, that the goods were no longer attached and were at the disposal of the judgment-debtor who alone had any rights in respect of them and that therefore the judgment in *Bhana Mal v. Ganpat Rai* (1) was inapplicable and that the decree-holder was entitled to take out fresh execution, but no authorities have been referred to. It was also stated that the rules of the English law adopted and followed in *Bhana Mal v. Ganpat Rai* (1) were not applicable to India, but here again no reasons or authorities were given for this contention.

The Civil Procedure Code of 1882 did not provide for cases where the application for execution could not proceed for default of the decree-holder and a practice arose of "striking off" or shelving the application. Such a practice was not justified by that Code and the proper order was one either granting or dismissing the application in whole or in part. The effect of "striking off" was discussed in numerous cases and it was held that no general rule was applicable, that the attachment was not necessarily put to an end and that the effect would depend on the circumstances of the case. A full discussion of this subject is to be found in Woodroffe and Ameer Ali's Commentary on the Code, Edn. 2, p. 960. The defect in the old Code was pointed out by Edge, C. J., in *Dhonkal Singh v. Phakkar Singh* (2) and in the present Code the situation is dealt with by O. 21, R. 57, which provides that where any property has been attached in execution of a decree, but by reason of the decree-

(2) [1893] 15 All. 84 (F.B.).

(1) [1899] 21 P. R. 1899.



holder's default, the Court is unable to proceed, it shall either dismiss the application, or adjourn it and that upon such dismissal, the attachment shall cease. The present rule however does not indicate whether a dismissal for default can be set aside and whether, if not set aside, a fresh application for execution is, or is not barred. In *Nomuna Bibi v. Roshun Meah* (3) it was held that on the dismissal of an application under this rule the attachment ceases even if the Judge intended to continue it.

Coming to the facts of the present case, it is clear that the Munsif was not justified in "striking off" the application for execution on 7th June 1916. He did not dismiss it as assumed in arguments in this Court. In accordance with O. 21, R. 57, he should either have dismissed it or adjourned it. He was not legally competent to do anything else. The intentions of the Munsif cannot be considered. In my opinion therefore it must be held that the application was not dismissed and that the attachment continued to subsist. The order of the Munsif dated 27th July 1917 is similar except that he specifically released the property. I think the order of release must be regarded as one involving and implying the dismissal of the application, and that the application should be held as having been dismissed, and to this extent, I am prepared to follow the conclusions to be gathered by the decisions of the Courts under the old Code when dealing with applications which had been "struck off." The result of this finding is that the attachment ceased on 27th July 1917. Thereafter the goods were at the disposal of the judgment-debtor. Whether the goods had been all along in his possession or not, it is not denied that he took no steps whatever to recover them. It is incredible that if he had not been in possession of the attached property, or was not in collusion with the care-taker, he would not have taken very prompt steps to recover it.

I hold without taking the report of the bailiff into consideration that the property attached had either been left in the possession of the judgment-debtor, or that he subsequently obtained possession of it, or that the judgment-debtor has been in collusion with the

care-taker and that he was a party to the disappearance of the said property. This last finding brings the case within *Bhana Mal v. Ganpat Rai* (1). I therefore dismiss the appeal with costs.

R.M./R.K.

Appeal dismissed.

### A. I. R. 1919 Lahore 339

SCOTT-SMITH AND MARTINEAU, JJ.

*Khuda Baksh and others*—Plaintiffs—Appellants.

v.

*Mt. Fattah Khatun and others*—Defendants—Respondents.

Second Appeal No. 2233 of 1914, Decided on 28th May 1918, from decree of Divl. Judge, Multan, D/- 10th June 1914.

Custom (Punjab) — Succession — Karloo Jats of Multan—Suit for possession by inheritance of land belonging to first cousin from sisters of last owner—First cousins excluded by sisters and daughters under *Riwaj-i am* unsupported by instances—*Riwaj-i am* does not raise presumption in favour of custom described in it—Sisters failing to prove custom excluding collaterals—Mahomedan law applies—Mahomedan Law, Applicability.

A *Riwaj-i am* which, without citing any instances, describes a special custom opposed to the general custom of the province and the great mass of authorities, does not raise a presumption in favour of the special custom described in it.

[P 340 C 2]

The mere entry in a *Riwaj-i am* that male collaterals as near as first cousins are excluded by sisters and daughters, unsupported by instances, is not sufficient to shift the onus on to the cousins to establish their right of succession: *A. I. R. 1916 P. C. 129 (P.C.)*, *Dist.* and *42 I. C. 358, Foll.*

[P 340 C 2; P 341 C 1]

Where no definite custom is proved the personal law of the parties must be followed: *4 P. R. 1888; 89 P. R. 1888 and 117 P. R. 1901, Foll.*

[P 341 C 1]

Plaintiffs sued for possession by inheritance of certain land the property of their first cousin. Defendants were the sisters of the last owner. According to the *Riwaj-i am*, which did not cite any instances, first cousins were excluded by sisters and daughters.

*Held*: (1) that no reliance could be placed upon the *Riwaj-i am* as it did not cite any instances; (2) that the onus lay upon the defendants to establish that among Karloo Jats of Multan District the sisters of a male proprietor excluded his collaterals as near as first cousins; (3) that no specific rule of custom having been proved, Mahomedan law must prevail and the plaintiffs were entitled to half the property, their share according to that law; (4) that the plaintiffs could not be deprived of their rights merely because they had claimed the whole of the property in accordance with custom. [P 341 C 1]

*Mohammad Shafi*—for Appellants.

*Sheo Narain*—for Respondents.



**Judgment.**—This is a second appeal upon a certificate granted by the District Judge from the order of the lower appellate Court dismissing the plaintiffs' suit for possession of certain land, the property of their first cousin Chiragh deceased. Defendants are the sisters of Chiragh, and the question is whether according to custom the plaintiffs exclude the sisters. The parties are Kalroo Jats of Nawabpur village in the Tahsil and District of Multan. As pointed out by the lower appellate Court, the case depends mainly on the question of onus. It says that if the onus is laid on the plaintiffs they fail, and if it is laid on the defendants they fail. In the *Riwaj-i-am* of the Multan District the answer to question 13 is as follows:

Except the 82 castes who follow the law, the other Mahomedans say that as long as there are male collaterals within three degrees sisters and daughters are excluded. The three degrees are thus reckoned: (1) deceased, (2) brothers, (3) brothers' sons. The lower appellate Court points out that

"in the ordinary method of reckoning degrees of relationship the plaintiffs would come within three degrees, but in the special manner in which the degrees are reckoned as stated above the plaintiffs do not come within the three degrees. The result is that the Customary law as above stated is not in favour of the plaintiffs."

No instances are given in the *Riwaj-i-am*. Plaintiffs produced some oral evidence in support of their contention, but it is really worth little. The defendants produced none; and the onus was laid upon the plaintiffs by the lower appellate Court because they came into Court seeking to oust the defendants who were already in possession of the property, the revenue authorities having sanctioned mutation of names in their favour and the Customary law as referred to above being in their favour. Mr. Mohammad Shafi in arguing the case on behalf of the appellants laid stress on the fact that there are no instances appended to the answer relied upon by the other side. He urges that entries in the *Riwaj-i-am* of this sort, unsupported by instances, are worth very little. He also points out that the way of reckoning degrees of relationship stated in the *Riwaj-i-am* is a most unusual one and not warranted by the decisions of this Court. Pandit Sheo Narain on behalf of the respondents lays very great stress upon the Privy Council

case reported as *Beg v. Allah Ditta* (1), wherein their Lordships stated as follows:

"The *Riwaj-i-am* was produced and exhibited as evidence at the very outset of the case; it is a public record prepared by a public officer in discharge of his duties, and under Government rules, it is clearly admissible in evidence to prove the facts therein entered, subject to rebuttal. In their Lordships' opinion, the statements contained in the *Riwaj-i-am* form a strong piece of evidence in support of the custom, which it lay upon the plaintiffs to rebut, and this, according to the findings of the Divisional Judge they failed to do."

In that case there were no instances in support of the entry in the *Riwaj-i-am* but as above noted, it was relied upon by their Lordships of the Privy Council. Pandit Sheo Narain urges that the entry in the *Riwaj-i-am* relied upon by his clients is presumptive evidence in support of the custom which it lay upon the plaintiffs to rebut and that the onus was rightly placed upon them. Now this judgment of the Privy Council was considered by a Division Bench of this Court in the case of *Wazira v. Mt. Maryan* (2) and the following passage occurs at p. 337 (of 1917 P. R.)

"That judgment [reported as *Beg v. Allah Ditta* (1)] must be read as a whole. The Privy Council were dealing with a case in which the *Riwaj-i-am*, even though it cited no instances, was nevertheless in full accord with a well known custom which is nonetheless well established because it forms an exception to the general rule that male collaterals exclude daughters. In such a case it was doubtless for those who controverted the the *Riwaj-i-am* and the weight of authority to rebut the case arrayed against them. But the matter is different when, without citing any instances, a *Riwaj-i-am* which has been imperfectly compiled describes a special custom opposed to the general custom of the Province and the great mass of authorities."

It is contended by Mr. Shafi that the custom here relied upon by the respondents and referred to in answer 13 of the *Riwaj-i-am* is a very peculiar one and quite opposed to the customary law and further that the method of calculating degrees of relationship is also a peculiar one. We fully agree with him and we hold that for the reasons stated in *Wazira v. Mt. Maryan* (2) the ruling of their Lordships of the Privy Council in *Beg v. Allah Ditta* (1) does not apply to such cases as the present. We therefore hold that the mere entry in the *Riwaj-i-am* that male collaterals as near as first

(1) A. I. R. 1916 P. C. 129=28 I. C. 354=44 I. A. 89=45 P. R. 1917=44 Cal. 749 (P. C.).

(2) [1917] 84 P. R. 1917=42 I. C. 258.



cousins are excluded by sisters and daughters, unsupported by instances is not sufficient to shift the onus on to the plaintiffs.

In the case reported as *Mt. Khairan v. Khanan* (3) the parties to which were Kalroo Jats of the Multan District, it was found that no custom was proved by which daughters succeed to their father's immovable property to the exclusion of brothers' sons. At p. 26 (of 1889 P. R.) of the report the learned Judges pointed out that their decision did not affirm the existence or non-existence of any custom as to the right of succession inter se of daughters and brothers' sons, but that it was wholly negative in its result, namely that no custom was proved by which either class succeeds to the exclusion of the other. Accordingly the case was decided in accordance with the principles of Mahomedan law. The same was held in *Khanan v. Mt. Jatti* (4) the parties to which were also Kalroo Jats of Thasil and District Multan and Mahomedan law was again followed. Mr. Shafi contends, firstly, that his client should be given the whole of the property because the defendants have not proved any custom contrary to the general custom by which first cousins exclude daughters and sisters, or in the alternative that the rule of decision should be that of Mahomedan law under which his clients would get half of the property and the defendants the other half. The lower Courts declined to follow Mahomedan law because the plaintiffs did not base their claim upon that law but upon custom. In this connexion Mr. Shafi cited *Mt. Sardar Bibi v. Sayad Ali Shah* (5), *Nasirud Din Shah v. Lal Bibi* (6) and *Sheeran v. Mt. Sharman* (7) as authorities for the proposition that where no definite custom is proved Mahomedan law must be followed. We do not think plaintiffs can be deprived of this rights merely because they claimed the whole of the property in accordance with custom. Our finding is that no specific rule of custom is proved and that in accordance with the previous decisions Mahomedan law must be followed.

We therefore accept the appeal and setting aside the order of the lower Court grant the plaintiffs a decree for

half of the property claimed. In the circumstances we direct that the parties should bear their own costs throughout the litigation.

R.M./R.K.

*Appeal accepted.*

### A. I. R. 1919 Lahore 341

BROADWAY AND ABDUL RAOOF, JJ.

*Afzal Khan and others—Defendants—Appellants.*

v.

*Mt. Mahtab Bibi—Plaintiff—Respondent.*

First Appeal No. 1050 of 1915, Decided on 16th May 1919, from decree of Senior Sub-Judge, Lahore, D/- 1st February 1915.

Civil P. C. (1908), O. 41, R. 33—Suit to recover dower—Decree apportioning liabilities of various properties—Appellate Court has power to pass proper decree.

Where in a suit for recovery of a specific sum of money as dower, the Court had no materials before it to apportion the liabilities of various properties but nevertheless directed that the sum be recovered from these properties in a certain proportion.

*Held:* that the decree should not have contained this direction, and that the High Court had power to pass a proper decree by expunging from the decree of the lower Court the direction with regard to the manner of the realisation of the decretal amount. [P 344 O 1]

*Ghulam Rasul and Moti Sagar—for Appellants.*

*Fazl-i-Husain and Niaz Muhammad—for Respondent.*

**Judgment.**—This first appeal arises out of a suit for recovery of dower by Mt. Mahtab Bibi, a widow of one Sardar Mir Alam Khan, under the following circumstances: Sardar Mir Alam Khan married the plaintiff some time about 1876. From her he had three sons, Nur Alam Khan, defendant 1, in the case, Mir Hassan Khan, defendant 2, and Muhammad Aslam Khan, defendant 3. There are three daughters also, but their names need not be mentioned here as they are not parties to this suit. His second wife was Mt. Fatima Bibi, who is defendant 7. From her also he had three sons, Mir Afzal Khan, Said Alam Khan and Nazir Alam Khan, who are impleaded as defendants 4, 5 and 6 in the plaint.

Mir Alam Khan died in the year 1911 possessed of moveable and immovable property. The six sons above mentioned came into possession thereof. The plaintiff demanded from them Rs. 10,000, the amount of her dower due from the deceased Mir Alam Khan, on the ground of

(3) [1889] 12 P. R. 1889.

(4) [1892] 116 P. R. 1892.

(5) [1888] 4 P. R. 1888.

(6) [1888] 89 P. R. 1888.

(7) [1901] 117 P. R. 1901.



their being in possession of the assets of her deceased husband. They having failed to satisfy her claim, the present suit was instituted by her. The plaint was presented unstamped with court-fee with a prayer for permission to sue as a pauper on the allegation that she was not possessed of sufficient property to be able to pay the required court-fee. Her application to sue as a pauper was opposed by the defendants on the ground that she had inherited a share in her husband's estate and was therefore in a position to obtain funds for paying the court-fee. In fact Fakir Muhammad, agent of the defendants, actually offered to advance a loan of Rs. 500 on the security of her share in the property of the deceased. In spite of the opposition, permission was granted to her by the first Court on the finding that a will was being set up according to which the entire property was said to have been gifted away in favour of the six sons. The defendants came up in revision to the Chief Court and in para. 3 of their petition of revision, they again stated that the plaintiff was jointly with her sons in possession of immovable property in which she held a share by right of inheritance, that she had a saleable interest in their property and that their agent had offered to take over her share for an amount exceeding the amount of court fee payable on the plaint. The Hon'ble Chevis, J., rejected the petition for revision, repelling this plea on the ground that it was admitted on their behalf that all the estate had been disposed of by a will.

I may mention here that in spite of this plea the defendant Mir Afzal Khan had the courage to raise in his jawabdawa the inconsistent plea that Mir Alam Khan had divorced the plaintiff long before his death and that she had ceased to be his wife. Before the suit actually came to trial Nazir Alam Khan, defendant 6, had died on 27th March 1912 and Muhammad Afzal Khan has died since during the pendency of the appeal. The principal defendants in the case were Mt. Fatima Bibi and her sons, who actually resisted the claim of the plaintiff. The other defendants being her sons admitted the claim. The real defence is to be found set up in the jawabdawa put in on behalf of the brothers Mir Afzal Khan and Said Alam Khan. They plea-

ded that amount of dower alleged by the plaintiff was excessive and unreal and that, as a matter of fact, she being a low Kashmiri girl her dower was fixed at Rs. 30 only. They also resisted the claim on the plea that she had been divorced long ago and that her claim was long barred by time.

Issues were framed by the Court below on 27th March 1912, and the issues 3 and 4 related to these two pleas. The remaining issues need not be mentioned as no argument was raised before the Court as to matters covered by these issues. It lay upon the plaintiff to prove her claim for a dower of Rs. 10,000. The burden of proof as to this issue was placed upon her by the order of the Court. She in proof of her claim produced both oral and documentary evidence. The latter consisted of the record of a deposition of her husband in a suit for dower instituted so far back as 1899. In that suit the amount of dower claimed was Rs. 30,000 and Mir Alam Khan was called as a witness in proof of the amount. Nur Alam Khan, defendant 1, has stated in his evidence that before going to Court his father had taken the precaution of arming himself with the possession of the deed of dower for Rs. 10 000 which he himself had executed in favour of the plaintiff. He took the dower-deed with him and produced it before Court, when he stated that the dower which he had himself fixed upon his wife was Rs. 10,000. Bawa Baij Nath was the reader of the District Judge of Lahore at the time. He has been examined in this case to prove this statement of Nur Alam Khan, which was taken down by him in the case of *Muhammad Jan v. Mt. Bibi*, Appeal No. 18 of 1899. Mahtab-ud-din acted as an agent in the above-mentioned case, *Muhammad Jan v. Mt. Bibi*. He has also been produced as a witness in this case. He was present at the time when Mir Alam Khan stated before the Court that the dower of Mahtab Bibi was Rs. 10,000. He saw him producing before the Court a paper about the dower in support of his statement.

The written deposition on the record together with the statements of these two witnesses leaves no possible doubt as to the genuineness of the plaintiff's claim for Rs. 10,000, as her dower. This in our opinion was sufficient to establish



her claim, but in addition to this she has called several witnesses who have given direct evidence on the question of the amount of dower. Muhammad Amir, Imamuddin, Fazal Din, Ahmad Bakhsh, Rahim Ullah and Nur Ahmad were all present at the ceremony of the nikah and before their eyes and within their hearing the nikah took place. Rs. 10,000 as dower was fixed and a mehrnama was prepared. The lower Court has believed this evidence and found that the plaintiff has succeeded in establishing the amount of dower claimed by her. We ourselves have carefully examined the plaintiff's evidence on this point in the light of the criticism of Rai Moti Sagar, the learned counsel for the appellants, and have unhesitatingly arrived at the same conclusion. The evidence of rebuttal given on behalf of the defendants is utterly worthless. In fact Rai Moti Sagar frankly admitted it and did not like even to refer to it in his argument. In their forlorn hope of succeeding to gain their point they even brought into Court forged documents to which in this Court Rai Moti Sagar did not think proper to refer. We therefore do not wish to take any notice of them.

On this point therefore there can be no doubt the judgment of the Court below is unassailable. As regards the question of the alleged divorce and limitation, it may be mentioned at the outset that although the decision of the Court below was against the defendants on these two points also, originally no plea was raised on those two points in the memorandum of appeal as originally framed. Later on in amplification of grounds 1 and 5 an additional ground was added by Mr. Goulam Rasul, the counsel who filed the appeal. No ground however was even then taken against the finding of the lower Court on the question of divorce. As we have already mentioned in the early part of our judgment, the plea of divorce was merely an afterthought. A plea quite contradictory to this plea was raised in the proceedings relating to the inquiry into the question of the plaintiff's pauperism. However, be that as it may let us see whether the defendants have succeeded in making good this plea, the burden of establishing which lay heavily upon them. As found by the learned Judge of the Court below in the hope of throwing dust into everyone's eye, they

brought into Court a forged register kept by a deed-writer in which an entry as to the execution of a taluknama is to be found, wherein an extract of the contents of the document is given. It is to the effect that

"Mt. Mahtab Bibi is disobedient and she does not behave properly. According to Mahomedan law I of my own accord have pronounced the word 'divorce' thrice and have made her unlawful for my person."

The name of Mir Alam Khan is entered as the executant of the document. An extract from the register containing the entry is on the record and its translation is to be found printed at p. 27 of the printed record. The register itself was before the Court below which came to the conclusion that there were grounds to look upon the entries with suspicion. The pages containing the entries appeared to the Court to have been intentionally "dirtied by an unusual amount of fingering." Taking this circumstance into consideration along with a number of other circumstances, the Court treated the entry as spurious and wholly unreliable. We entirely agree in the reasons given by the Court below. We are not however in a position to express any opinion as to the register of the deed-writer, because the defendants have not thought fit to have it brought up before this Court. Having regard to the strong finding of the Court against the register, it was the duty of the defendants to have placed it before this Court if they wished to get rid of the finding on the point. Evidently having failed to mislead the Court below they brought it wise not to make an attempt here. The oral evidence under this head also is as worthless and unreliable as under the first head and we fully agree with the Court below that it cannot be believed. An attempt was made on behalf of the defendants in the Court below to rely upon certain circumstantial evidence to show that the plaintiff must necessarily have been divorced by her husband. A will is produced in which provision is made for the sons and no mention is made of the plaintiff, but as the learned Judge has remarked, defendant 7 also is not mentioned nor are any of the daughters. The properties are divided among the sons of Mahtab Bibi and Fatima Bibi and evidently the sons have been trusted to look after their mothers. There is therefore nothing in this circumstance which may point to-



wards divorce. As we have already stated no plea has been taken impugning this finding of the Court below, but we have allowed Rai Moti Sagar to address us on this point also. The case for the defence was a bad one and it was not possible for the learned counsel to say much in support of it.

The last plea urged by him is the one raised in para. 7 of his plaint. It is to the effect that the value of the property at Peshawar is less than one sixth of the value of property at Lahore and hence the decree against both properties in equal proportion is contrary to law and equity. This plea evidently impugns the concluding direction given in the decree of the Court below in these words:

"It is also directed that not more than half the sum shall be raised from the Peshawar property."

There is force in this plea. The Court below had no materials before it to apportion the respective liabilities of the Peshwar and Lahore properties. This is a question which can be tried only when it actually arises. Under R. 33, O. 41, we have power to pass a proper decree which ought to have been passed by the Court below. We therefore direct that the words quoted above be expunged from the decree. In other respects it will stand. The appeal therefore fails and is hereby dismissed with costs.

R.M./R.K. *Appeal dismissed.*

### \* A. I. R. 1919 Lahore 344

BEVAN-PETMAN, J.

*Sher Ali*—Plaintiff—Appellant.

v.

*Mangu and others*—Defendants—Respondents.

Second Appeal No. 2557 of 1918, Decided on 6th May 1919, from decree of Dist. Judge, Gurdaspur, D/- 15th June 1918.

(a) Civil P. C. (1908), O. 17, R. 3—O. 17, R. 3 is not mandatory.

Rule 3, O. 17, is an enabling rule and not a mandatory one. [P 345 C 2]

\*(b) Civil P. C. (1908), O. 17, R. 3—Mere order of dismissal based on default is not proper—Court not able to decide suit forthwith on material before it—Provisions of O. 17, R. 3 should not be availed of.

A mere order of dismissal based on default is not a proper or legal order under this rule. The Court should proceed with the disposal of the suit on the materials before it and, if the circumstances are such that it cannot decide the suit forthwith on the materials before it, it should not avail itself of the provisions of that rule. Where therefore it appeared at the first hearing

of a suit that certain defendants had not been served and the Court passed orders adjourning the case and directing issue of summons to all absent defendants on receipt of process-fees, or a proclamation by beat of drum at the expense of the plaintiff but the plaintiff took no action whatever in respect of the order and on the date of hearing gave no reasons for his default and pleaded no extenuating circumstances but asked for forgiveness and indulgence and the Court dismissed the suit under O. 17, R. 3:

*Held*, that under the circumstances R. 3, O. 17, was inapplicable and should not have been applied. [P 345 C 2]

*Abdul Razaq*—for Appellant.

*Hari Chand*—for Respondents.

**Judgment.**—The facts of this case are that at the first hearing of the suit, 11th January 1918, it appears that certain defendants had not been served. The Court passed orders, whether suo motu or at the request of the plaintiff does not appear from the record, to the following effect:

Summons to issue to all absent defendants on receipt of process-fees, a proclamation by beat of drum to be made for the next hearing, the plaintiff to pay five annas and four annas respectively for the proclamation in the local Tahsil and in the canal colony, the plaintiff to file particulars and addresses of defendants-respondents in the canal colony by the next day and summons to issue also to them, the defendants present to file their written statements of defence on 13th February."

The hearing was adjourned to 13th February. The plaintiff took no action whatever in respect of the above order, but appeared in Court on 13th February. He then gave no reasons for his defaults and pleaded no extenuating circumstances but asked for indulgence and forgiveness. Some of the defendants were present. The Court dismissed the suit under O. 17, R. 3, Civil P. C. and the District Judge dismissed the appeal. For the appellant it is submitted that O. 17, R. 3, applied only to an adjournment applied for by a party and not ordered suo motu by a Court as in the present instance. Reliance is placed on *Pearee Mohun Bera v. Shama Churn Mytee* (1), that the words "any other Act" mean some act subsequent to those previously mentioned in the rule and that the Court could proceed only to decide the suit and not dismiss it. The following decisions were relied on *Sitara Begum v. Tulshi Singh* (2), *Ram Narayan v. Jagdeo Missar* (3) and *Nagendra*

(1) [1873] 19 W. R. 34.

(2) [1901] 23 All. 462.

(3) [1911] 33 All. 690=10 I. C. 903.



*Kumar Bose v. Nabin Mandal* (4). It is also contended that the suit could not proceed alone against the defendants present in Court as the land was in the joint names of all defendants and that therefore the suit was rightly dismissed. The contention that the words "any other act" mean some act subsequent to those previously mentioned is untenable, is not pressed and need not be further dealt with. For the respondents it is briefly contended that O. 17, R. 3, does not by its terms indicate that it is applicable only to adjournments granted at the request of a party, that if the rule be held inapplicable the suit might be regarded as dismissed under O. 9, R. 2, Civil P. C., and finally, that if the appeal be accepted, costs should be allowed to the respondents throughout.

There are a number of judicial decisions dealing with the subject-matter of O. 17, R. 3, chiefly on the construction of S. 158, Act 14 of 1882, which is the corresponding section. The rule itself provides that in the event of certain defaults a Court may "proceed to decide the suit forthwith." This has been construed in *Nagendra Kumar Bose v. Nabin Mandal* (4), as meaning that the Court is not empowered to proceed to dispose of the suit by recording further evidence or otherwise proceeding with the suit, but that the Court is merely empowered to decide the suit forthwith. The learned Judges referred to the decisions in *Mariannissa v. Ramkalpa Gorain* (5) and *Cooke v. Equitable Coal Company* (6) as laying down the general principles applicable to S. 158, Civil P. C. In the former case it was held that the meaning of S. 158 was that the Court is to proceed with the disposal of the suit on the materials before it. The decision in *Sitara Begum v. Tulshi Singh* (2) is to the same effect and is an authority for holding that the suit cannot be summarily dismissed, but apparently the learned Judges in that case were of opinion that the Court could take further evidence and dispose of the suit in a normal way. In *Nagendra Kumar Bose v. Nabin Mandal* (4), already referred to, the learned Judges held that such a construction of that decision did not necessarily fol-

low and if that had been intended they were not prepared to place the same construction on S. 158. They held therefore that under that section the Court was merely empowered to decide the suit forthwith.

It may be urged how can the suit be decided forthwith if there are no materials on the record for a decision as in this case except by dismissal. Any such difficulty is, I think, solved by bearing in mind that R. 3, O. 17 is an enabling rule and not a mandatory one. If the circumstances are such that the Court cannot decide the suit forthwith on the materials before it, it should not avail itself of the provisions of that rule. It is clear as pointed out in *Sitara Begum v. Tulshi Singh* (2), that a mere order of dismissal based on a default is not a proper or legal order under S. 158. Had that been the intention of the legislature it could have easily provided for the dismissal of the suit as a penalty. This has not been done and, on the contrary, the Court is empowered, if it desires to avail itself of O. 17, R. 3, to decide the suit on the materials already before it. In the present case the first Court was not in a position to decide the suit. It had no materials for decision before it. The written statements of defence had not even been filed. Under these circumstances I think O. 17, R. 3, was inapplicable and should not have been applied. This Court is not concerned now with the orders of dismissal or otherwise which the first Court might have passed under other rules and orders but did not. I therefore accept the appeal and remand the suit to the Munsif at Shakargarh and direct him to proceed according to law. Costs in the lower appellate Court and in this Court shall be costs in the case. This appeal will for the same reasons dispose of the connected Second Appeal No. 2558.

R.M./R.K.

Appeal accepted.

### \* A. I. R. 1919 Lahore 345

BROADWAY, J.

*Jai Kishen Das*—Defendant—Appellant.

v.

*Din Muhammad*—Plaintiff—Respondent.

Second Appeal No. 2840 of 1918, Decided on 10th March 1919, from decree of Dist. Judge, Lahore, D/- 4-6-1918.

(4) [1909] 36 Cal. 189=1 I. O. 741.

(5) [1907] 84 Cal. 285.

(6) [1904] 8 O. W. N. 621.



\* Easements Act (1882), Ss 13 and 42—“Easement of necessity” means one without which dominant tenement cannot be used at all—Easement ceasing to be beneficial to dominant owner becomes extinguished.

An easement of necessity is an easement which is not merely necessary for the reasonable enjoyment of the dominant tenement but one without which that tenement cannot be used at all.

[P 347 C 2]

Plaintiff sold in 1905 a certain well together with all the land attached thereto to defendant. The sale-deed contained a clause stating that in the event of it being discovered at any time that any land belonging to the said well had been omitted from the deed, such land would be considered as having been sold as well. The deed did not reserve any easements to the plaintiff. In 1914 it having been discovered that three fields really belonged to the land, plaintiff executed a document admitting that they belonged to the defendant by virtue of the sale-deed. On 12th November 1914 plaintiff took these fields on lease and admitted that an ancient road through these fields belonged to the defendant. Subsequently plaintiff instituted a suit for a declaration that these documents had been obtained from him by coercion, but having failed therein he brought the present suit for an injunction restraining defendant from blocking a roadway through one of these fields claiming to have acquired the right to use the road by prescription and of necessity:

*Held:* that no easement of necessity had been proved and that in any event any easement that might have existed had become extinguished owing to its having ceased to be beneficial to the plaintiff, and that consequently the plaintiff's suit was liable to be dismissed. [P 347 C 2]

*Tek Chand*—for Appellant.

*H. A. Herbert*—for Respondent.

**Judgment.**—The facts of the case out of which this appeal has arisen are as follows:

Din Muhammad owned two wells in Bela Basti Ram one called Illachiwala and the other Motasinghwala. On 15th November 1905 he sold the latter, together with all the land attached thereto, to Rai Bahadur Jai Kishen Das. The numbers of the land conveyed were entered in the deed of sale, which also contained a clause to the effect that in the event of it being discovered at any time that any land belonging to the said well had been omitted from the deed such land would be considered as having been sold as well. Din Muhammad was at the time of the sale, a tenant of a small plot of Government waste land which lay between his two wells, and by the same deed of sale he conveyed all his tenant's rights in this Government land to Jai Kishen Das. No easements of any kind were reserved to Din Muhammad

by the deed. In 1914 it was discovered that three fields, then bearing numbers 627, 628, 629, lying to the south of the Government land and contiguous to it, really belonged to Chah Motasinghwala and on 10th November 1914 Din Muhammad executed a document reciting this fact and admitting that they belonged to Jai Kishen Das by virtue of the deed of sale. On 12th November 1914 these three fields were taken on lease by Din Muhammad under a written lease. In these documents Din Muhammad admitted that an ancient road (*rasta qadimi*) through these fields belonged to Jai Kishen Das and would be used by Din Muhammad with permission only. At the time of the mutation which took place on the same day Din Muhammad raised objections and contended that these documents had been obtained from him improperly. He then instituted a suit asking for a declaration that these documents had been obtained from him through coercion and by undue influence. It was held that these three fields had been included in the sale of 1905 and that the two documents had not been obtained by coercion or undue influence. He appealed and lost and a second appeal was dismissed by the Chief Court and an attempt to get this order reviewed also failed. Having failed so far, Din Muhammad instituted the present suit on 19th April 1917 asking for an injunction to issue against Jai Kishen Das prohibiting him from blocking a roadway through one of these fields (now No. 707) and field No. 702 of the Government land. Din Muhammad claimed that he had acquired the right to use the road by prescription and of necessity.

The trial Court granted him a decree, holding that he had an easement by prescription over No. 702 and of necessity over both Nos. 702 and 707. Jai Kishen Das appealed against this decree but his appeal was dismissed, the learned District Judge holding that although Din Muhammad could not claim an easement by prescription over either of the two fields he had an easement of necessity over No. 707, and an easement by an implied grant over No. 702. Against this appellate decree Jai Kishen Das has preferred this second appeal through Mr. Tek Chand and I have heard Mr. Herbert for Din Muhammad, respondent. Turning first to field No. 702, Mr. Tek Chand con-



tended that on the findings arrived at, the learned District Judge should have dismissed the suit *qua* this field and that he has acted erroneously in setting up a totally new case for the respondent. He cited *Shivabasava v. Sangappa* (1), *Waliullah Khan v. Muhammad Israrullah Khan* (2), *Official Trustee of Bengal v. Krishna Chandra Muzumdar* (3), *Bhagwant Singh v. Pandit Joti Sarup* (4), *Budha Mal v. Gulab* (5) and *Muhammad Niazuddin Khan v. Muhammad Umar Khan* (6). Mr. Herbert did not contest the principles enunciated in these authorities, but contended that no new case had been set up. He argued that an easement created by an implied grant was the same thing as an easement of necessity—and referred to the Indian Easements Act by Sanjiva Row, p. 82, Notes B, C, D. These authorities are *Morgan v. Kirby* (7), *C. H. Crowdy v. L. O'Reilly* (8) and *Po Kin v. Maung La* (9) but are clearly not in point and do not support Mr. Herbert's contentions. There has been no severance of any heritage so far as No. 702 is concerned and the learned District Judge was right in holding that no easement of necessity could be claimed *qua* No. 702.

It seems to me however that he has erred in setting up a new case for the plaintiff-respondent and further I consider that he has erred in thinking there was any grant by implication. In the first place, the land belonged to the Government and the Government was not a party to the suit. Again, to whom was the grant by implication made? To Din Muhammad or to the tenant for the time being? It seems to me that the tenant for the time being would be entitled to use the land in any manner he pleased, and the learned District Judge has lost sight of the fact that the entries in the revenue papers show that No. 702 was under cultivation. In the mislhaqiat of 1891-92 this number is shown as "chahi doom" and under cultivation and the same is the case in the jama-

bandis of 1896-97 and 1900-01. Din Muhammad himself admits that this number was under cultivation in 1905, though he says he had left enough for a roadway. In these circumstances the suit must be dismissed so far as No. 702 is concerned. Now as to No. 707, an easement of necessity is an easement which is not merely necessary for the reasonable enjoyment of the dominant tenement, but one without which that tenement cannot be used at all: *C. H. Crowdy v. L. O'Reilly* (8) and *Sukhdei v. Kidarnath* (10), Halsbury's Laws of England, Vol. 2, para. 487. p. 241. In the present case admittedly the respondent can gain access to his well on foot and the appellant's counsel specifically stated before me in Court that the respondent had not been stopped from going on foot—and would not be stopped from so going. The respondent however claims a right to a cart road. I am unable to see how it can be said that the dominant tenement cannot be used at all without this cart road. Again it seems to me that the principles of S. 42, Easements Act, are here applicable. I have held that the respondent has no easement of any sort over No. 702. This being the case, any easement over No. 707 ceases to be beneficial to the dominant owner," and is therefore extinguished.

I understood Mr. Herbert to admit the correctness of this contention by Mr. Tek Chand and in any event it seems to me to be beyond question. I therefore hold: firstly, that no easement of necessity has been proved *qua* No. 707, and secondly, that in any event any easement that might have existed has become extinguished owing to its having ceased to be beneficial to Din Muhammad. It is not necessary to deal with the other points raised by Mr. Tek Chand. I accordingly accept this appeal and dismiss the suit with costs throughout.

R.M./R.K.

*Appeal accepted.*

(10) [1911] 88 All. 467=9 I. C. 628.

### A. I. R. 1919 Lahore 347

BROADWAY, J.

*Daulat Ram*—Petitioner.

v.

*Emperor*—Opposite Party.

Criminal Revn. No. 855 of 1918, Decided on 9th September 1918, from order of Sess. Judge, Jullundur, D/- 8th July 1918.

(1) [1905] 29 Bom. 1=31 I. A. 154=8 Sar. 720 (P.C.).

(2) [1888] 10 All. 627.

(3) [1886] 12 Cal. 239=12 I. A. 166 (P.C.).

(4) [1897] 4 P. R. 1897.

(5) [1897] 36 P. R. 1899.

(6) [1907] 1 P. R. 1907.

(7) [1874-80] 2 Mad 46.

(8) [1912] 17 I. C. 966.

(9) [1907-08] 4 L. B. R. 246.



**Criminal P. C. (1898), Ss. 431 and 439—Death of applicant—Revision abates except in so far as it relates to fine.**

The principle contained in S. 431 is applicable also to cases on the revision side, so that on the death of an applicant for revision the revision would abate except in so far as it relates to a sentence of fine. [P 348 C 1]

*Nand Lal*—for the Crown.

**Judgment.**—Daulat Ram is dead and his personal interest in the revision is at an end. In *Khazana v. Queen Empress* (1) it was held that in such a case the principle of S. 431, Criminal P. C., was applicable to revisions. Since that decision was passed S. 431, Criminal P. C., has been amended by the addition of the words "except an appeal from a sentence of fine," and I think that the same principle should be applied to cases on the revision side. To some extent I am supported in my view by *Prem Singh v. Bhola* (2). As pointed out in the last cited case the object of this amendment to S. 431, Criminal P. C., was clearly to prevent the estate of a deceased person being damaged. In the present case, the fine is a heavy one and its recovery from the estate would entail hardship on the widow, which I consider would be quite unnecessary. I accordingly accept the revision so far as to set aside the order as to the payment of the fine.

R.M./R.K.

*Petition accepted.*

(1) [1893] 6 P. R. 1893 Cr.

(2) [1908] 24 P. R. 1908 Cr.

### A. I R. 1919 Lahore 348

RATTIGAN, C. J. AND LEROSSIGNOL, J.

*Emperor*

v.

*Jagat Ram*—Respondent.

Criminal Appeal No. 863 of 1917, Decided on 19th April 1918, from order of Magistrate, 1st Class, Gurdaspur, D/- 30th April 1917.

(a) Civil P. C. (1908), O. 18, R. 5—Judge recording evidence under O. 18, R. 5, is not bound to append note that evidence was read out to witness when completed—No evidence that Judge has not read out depositions, presumption is that the Judge has complied with provisions of O. 18, R. 5,—Evidence Act, S. 80.

There is no provision of law that a Judge who records the evidence of a witness in cases to which O. 18, R. 5, applies shall append a note to the effect that the evidence of the witness when completed has been duly read out to him. In every such case it should be presumed under S. 80, that the statement was duly taken. [P 349 C 1]

Where therefore there is no evidence to show that the deposition of a witness in a civil suit was

not read over to him by the Judge, it must be presumed under S. 80, Evidence Act, that the Judge complied with the provisions of O. 18, R. 5, Civil P. C. [P 349 C 1]

(b) Criminal Trial—Locus Poenitentiae not allowed to an accused making false statement and who when subsequently tried for perjury adheres to his former statement—Penal Code (1860) S. 193.

A locus poenitentiae, should not be allowed to an accused person who has made a false statement in Court and who when subsequently tried for perjury adheres to his former statement, admits it was correctly recorded and asserts that it is true. [P 349 C 1]

*Mul Chand*—for the Crown.

*Dalrymple and Hari Lal Bahl*—for Respondent.

**Judgment.**—The respondent in this case, Jagat Ram, and the respondent in Criminal Appeal No. 864 of 1917, Mahant Kaul Das, were tried before Khan Faiz Mohammad Khan, Extra Assistant Commissioner, Magistrate of the first Class, upon charges under S. 193, I. P. C., of having given false evidence in a judicial proceeding before the Subordinate Judge of Gurdaspur in the case of *Jagat Ram v. Mangal Das*. The alleged false statements made by the two respondents, respectively, as recorded by the Subordinate Judge, were duly set forth in the charges against them, and they both stated when examined by the Magistrate who tried these cases, that the statements as recorded by the Subordinate Judge were true. The Magistrate at the conclusion of the trials (for each respondent was tried separately) found that in point of fact the said statements were false to the knowledge of the respondents, and that they had both deliberately and dishonestly perjured themselves in the Court of the Subordinate Judge. In view however of the decision of a single Judge of this Court reported as *Kartar Singh v. Emperor* (1), he held that it was impossible to convict the respondents, inasmuch as the record of the deposition of each of them in the Subordinate Judge's Court did not have appended to it "the usual note" that the depositions had been read over to the respondents and admitted by them to be correct. He felt compelled therefore to acquit them on the technical ground set forth in the judgment of this Court above referred to that there can be no conviction based on:

"A false statement which is not made and recorded with all formalities in the manner required by law."

(1) [1917] 12 P. R. 1917 Cr. = 39 I. O. 847 = 18 Cr. L. J. 607.



From this order of acquittal the Local Government has preferred an appeal under S. 417, Criminal P. C., and we have heard Mr. Mul Chand on behalf of the Crown and Mr. Dalrymple on behalf of the respondents. In our opinion the Magistrate was in error in holding that in the absence of "a definite note" on the Subordinate Judge's record, it was impossible for him to say that the statements were in fact read over to the accused persons when they gave evidence as witnesses in the civil suit. There is no provision of law that a Judge who records the evidence of a witness in cases to which O. 18, R. 5, Civil P. C., applies shall append a note to the effect that the evidence of the witness when completed has been duly read out to him.

As a matter of practice, and as a very wholesome rule such notes are frequently appended, but it is not obligatory on the Courts in civil cases to make a note to that effect. Accordingly in every such case it should be presumed under S. 80, Evidence Act, that the statement was duly taken or in other words was taken in accordance with the provisions of S. 182, Civil P. C. This is of course merely a presumption and can be rebutted by evidence that the deposition in question was not duly taken but in the absence of such evidence the Court is bound to presume that the provisions of the law as to the reading over of the evidence in the presence of the Judge and of the witness were duly complied with. Upon this point we must with every respect differ from the learned Judge who decided the authority relied upon by the Magistrate. In the present case there is no evidence that the depositions were not read over to the witnesses and the Magistrate ought therefore to have assumed that the Subordinate Judge complied with the provisions of O. 18, R. 5, Civil P. C. Upon these facts it is unnecessary for us to discuss the question whether a locus penitentie should be allowed to a person who has made a false statement in Court and the Court has omitted to comply with the provisions of O. 18, R. 5, of the Code. But whether it is to be allowed or not we cannot but think that such indulgence is excessive in a case where the person in question when subsequently tried for perjury adheres to his former statement admits it was cor-

rectly recorded and asserts that it is true. For the reasons given we accept the appeal and setting aside the order of acquittal we direct the Magistrate to proceed to judgment in accordance with law.

R.M./R.K.

*Appeal accepted.*

### A. I. R. 1919 Lahore 349

CHEVIS, J.

*Maya Wanti*—Plaintiff—Petitioner.

v.

*Tulsi Das and others*—Defendants—Opposite Party.

Civil Revn. Petn. No. 511 of 1918, Decided on 12th February 1919, against decree of Dist. Judge, Attock, D/- 7th May 1918.

Civil P. C. (5 of 1908), Sch. 2, Para. 21 (2)—Decree in accordance with award—Revision is not competent.

A decree passed in accordance with an award is final and cannot be interfered with in revision. [P 349 C 2]

*Govind Das*—for Petitioner.

*Sheo Narain*—for Opposite Party.

**Judgment.**—The case is one for rendition of accounts. On my asking Bhagat Govind Das why an appeal was not lodged, he replies, as of course I expected that an appeal is barred by Para. 21 (2), Sch. 2, Civil P. C. Ordinarily an appeal would lie, but the legislature has deliberately shut the door of appeal. To allow the petitioner to get over the difficulty by interfering on revision would, in my opinion, be to defeat the object of the legislature. It would be as if the owner of the house has locked the front door against an importunate visitor and one of the inmates were to give admittance through a back door. In the case reported as *Ghulam Jilani v. Muhammad Hussan* (1) their Lordships of the Privy Council, after noting that they fully agreed with the Chief Court that no appeal lay, proceed to say :

"Unfortunately in dismissing the appeal it was suggested by the Full Bench that although an appeal would not lie . . . . an application might be made in revision . . . . Accordingly the appellants were permitted to present an application in revision . . . . Their Lordships are inclined to agree with the view of Clark, J., in *Jangi Ram v. Mt. Budho Bai* (2) that in the case of an award revision would be more objectionable than an appeal."

These remarks seem to me strongly to support my view. I decline to interfere.

(1) [1902] 29 Cal. 167=29 I. A. 51=25 P. R. 1902 (P.O.).

(2) [1901] 84 P. R. 1901 (F.B.).



and dismiss this application for revision, though I pass no order as to costs.

R.M./R.K. *Application dismissed.*

### A. I. R. 1919 Lahore 350

BROADWAY, J.

*Itbar*—Plaintiff—Appellant.

v.

*Wilayat and others*—Defendants—Respondents.

Second Appeal No. 87 of 1919, Decided on 18th March 1919, from decree of Dist. Judge, Attock, D/- 21st June 1918.

Registration Act (16 of 1908), S. 17 (c)—Endorsement on sale-deed of land acknowledging receipt of value of house erected thereon is compulsorily registrable.

On 24th June 1916 *H* sold a plot of land to *G* for Rs. 99. *G* erected a kotha on it, but one *M* claimed to pre-empt the land and his right of pre-emption being admitted, he took over the land at the same price and paid Rs. 200 to *G* for the kotha. The sale of the land was evidenced by an endorsement on the sale-deed of 24th June and the sale of the kotha by a separate receipt for Rs. 200. Both these documents were executed on 21st December 1916. On 24th January 1917 the present plaintiff instituted a suit against *G* for possession by pre-emption. It was admitted that his right to pre-empt was inferior to that of *M*. It appeared that by the endorsement on the sale deed of 24th June 1916 *G* acknowledged receipt of the price of the land as well as the cost of the kotha and relinquished his rights in both :

*Held*: (1) that the mere fact that a separate receipt was given for the cost of the kotha did not render it capable of being regarded as a separate and separable transaction; (2) that inasmuch as *G* clearly relinquished his rights and interests in both the land and the kotha, the document evidencing this transaction was compulsorily registrable; (3) that not being registered, it was not admissible in evidence and the plaintiff was entitled to succeed.

[P 351 C 1]

*Nand Lal*—for Appellant.

*B. A. Cooper*—for Respondents.

**Judgment.**—On 24th June 1916 one Hidayat sold a plot of land to Ghulam Muhammad for Rs. 99. Ghulam Muhammad proceeded to erect a kotha on the said plot of land, but one Mira came forward and claimed to be entitled to pre-empt the land sold. Mira's right to pre-empt was admitted and matters were settled amicably. Mira took over the land at the same price of Rs. 99 and paid Rs. 200 to Ghulam Muhammad for the kotha erected thereon. This arrangement was evidenced by two documents, by sale of the land by an endorsement on the sale-deed of 24th June 1916, and the sale of the kotha by means of a receipt for Rs. 200. These two docu-

ments were executed on 21st December 1916. On 24th January 1917, Itbar instituted a suit against Ghulam Muhammad claiming to pre-empt the land and alleging that the real price paid was Rs. 50 and not Rs. 99. Ghulam Muhammad pleaded that Rs. 99 had been paid, and while not denying Itbar's right to pre-empt contended that he had sold the land to Mira who had a preferential right to that of Itbar who should be impleaded. Mira was accordingly brought on to the record. The trial Court came to the conclusion that the two documents that passed between Ghulam Muhammad and Mira were fictitious and further that they created an interest in immovable property which was over Rs 100 in value and required registration. Itbar was accordingly given a decree for possession on payment of Rs. 199 including the cost of the improvements. Ghulam Muhammad and Mira appealed against this decree to the learned District Judge, who held :

(1) that the sale to Mira was genuine and had been followed by possession; (2) that the sale of the land was for Rs. 99 only and the document evidencing it did not need registration, and dismissed Itbar's suit. Itbar has now come up to the Court in second appeal through Dr. Nand Lal and I have heard Mr. Cooper for the respondents. The only point for determination is whether the learned District Judge has taken a correct view of the transaction. It was not contended before me that Mira's right to pre-empt was not superior and I am unable to see that the sale to Mira was in any way fraudulent.

Dr. Nand Lal contended that the two documents must be taken together and that they jointly created an interest in immovable property of over Rs. 100 in value. I have carefully considered the various authorities cited by him, viz., *Futteh Chund Sahoo v. Leelumber Singh Doss* (1), *Virchand Lalchand v. Kumaji* (2), *Buta Singh v. Gurdit Singh* (3), *Gopi Ram v. Ram Dhan* (4), *Uttam Chand v. Janki Ram* (5) and *Ram Singh v. Batan Singh* (6) and while I am in accord with

(1) [1872] 9 B. L. R. 433=16 W. R. 26=14 M. I. A. 129 (P.C.).

(2) [1894] 18 Bom. 48.

(3) [1896] 10 P. R. 1896.

(4) [1918] 44 I. C. 228.

(5) [1919] 48 I. C. 390.

(6) [1916] 36 I. C. 374.



the principles enunciated in them, I consider that each case must be looked at on its own set of facts. What do these documents actually convey? By the endorsement on the sale deed does Ghulam Muhammad transfer to Mira his rights in the land only bought by him from Hidayat?

The endorsement is as follows:

"... jo ke mablag nizanwe rupiya...  
az Musimmi Amir se ba taur razinama ba  
hasur qawhan ke wasul pa liye hain aur  
mihnatina bhi ba taur razinama ke wasul pa  
kar alaidah rasid likhdi hai aur mablagat  
mazkura naqd wasul pa kar qabza makan de  
diya hai aur bqi mera mel sakni wa makan  
ke sath kuchh talluq na raha..."

It will be seen that according to this Ghulam Muhammad distinctly says that he had received the price of the land as well as the cost of the makan after which he had given possession of the land and makan, and then he goes on to say that he relinquishes his rights in the land and makan. The mere fact that a separate receipt was given for the cost of the makan does not to my mind render this capable of being regarded as two separate and separable transactions. In the endorsement Ghulam Muhammad clearly relinquishes his interests in something more than the land, viz., the makan erected thereon and the document must, I think, be regarded as one of which registration was necessary. In these circumstances I accept the appeal and hold that Itbar is entitled to possession. The lower appellate Court has however not decided the question as to what the costs of the improvements were. I accordingly return the case to the learned District Judge, who will hear the parties on this point which was raised in ground 3 of the appeal to him and decide what amount the appellant Itbar is bound to pay before he can take possession. The appellant will get his costs in this Court.

R.M./R.K. *Appeal accepted.*

**A. I. R. 1919 Lahore 351**

SCOTT-SMITH AND DUNDAS, JJ.

*Bank of Peshawar Ltd., Multan City*  
—Plaintiff—Appellant.

v.

*Madho Ram* — Defendant — Respondent.

First Appeal No. 2925 of 1917, Decided on 2nd May 1919, from decree of Senior Sub-Judge, Lahore, D/- 18-6-1917.

**Company — Liquidation — Allotment of shares—Application for—Allotment held invalid — Revocation before ratification — Share-holder held not liable.**

The liquidator of a Bank sued one M for recovery of a certain sum of money on the basis of a promissory-note alleged to have been executed by him and one S jointly. It was alleged that M and S applied for the allotment of certain shares in the Bank which shares were allotted by the Managing Director on 29th June 1911 and notice of the allotment was given to M and received by him on 5th January 1912. On 18th January M repudiated the allotment and denied having made any application. It appeared that on 20th November 1908 two Directors of the Bank had made a delegation of the power of allotting shares to the General Manager, and that subsequently on 27th November 1908 these two (one representing a third Director by proxy) together with a third purported to confirm the decision of the previous week. It appeared further that neither of these two Directors had paid their allotment money by that date:

*Held*: (1) that under the circumstances no proper meeting of the Directors could be said to have been held and that there was no valid delegation of the power of allotting shares.

[P 352 C 2]

(2) That, consequently there was no valid allotment of the shares to the defendants and therefore there was no consideration for the promissory note.

[P 353 C 1]

(3) That in any case it was open to the defendant to revoke his application for the allotment of any shares provided the revocation was anterior to the date of any valid allotment or ratification by the Board of Directors. [P 353 C 1]

(4) That no valid ratification of the invalid allotment before revocation could be said to have been proved.

[P 353 C 1, 2]

(5) That under the circumstances, the defendant was not liable. [P 353 C 2; P 354 C 1].

*H. Beechy and D. Saunders*—for Appellant.

*Moti Sagar and Shamair Chand*—for Respondent.

**Judgment.** — The present suit was brought by the liquidator of the Bank of Peshawar against one Madho Ram, Manager of the Punjab National Bank, for recovery of Rs. 18,428-2-10 on the basis of a promissory-note for Rs. 15,445 executed by Lala Madho Ram and Sidhu Ram jointly, at Multan, on 18th December 1911. The plaint alleged that on that date the defendant Madho Ram and Sidhu Ram applied for the allotment of 3,089 shares in the Bank of Peshawar, Ltd, on which Rs. 2 per share were payable on application and Rs. 3 per share on allotment the total sum due on the allotment of these shares being therefore Rs. 15,445. The shares were duly allotted by the Managing Director of the Peshawar Bank, Lala Parmanand Khanna on 29th December 1911 and notice of the



allotment was given to Lala Madhu Ram and received by him on 5th January 1912. On 18th January 1912 Lala Madho Ram wrote to the General Manager of the Bank of Peshawar repudiating this allotment and denying that he had made any application for shares or any payment for shares. Subsequently on 29th January 1912 it is alleged that a first call was made on these shares, payment of which was refused by the defendant.

On 16th February two of the Directors of the Bank of Peshawar recorded a resolution that these shares should be forfeited. The Bank of Peshawar went into liquidation in the year 1913 and the present suit has been brought by the liquidator to recover Rs. 13,945 principal (Rs. 15,445 less Rs. 1,500) and Rs. 4,483-2-10 interest on the promissory note of 18th December 1911; Rs. 1,500 the balance of the principal sum is said to have been paid by Lala Sidhu Ram who has been discharged from further liability. The defendant amongst other pleas denied execution of the promissory note or signing the application for shares. The learned Subordinate Judge who has decided this case has found that the defendant duly executed the promissory note in suit and submitted the application for shares of 18th December 1911. He has however found that the allotment of shares to the defendant by Lala Parmanand was invalid inasmuch as there was no valid delegation by the Board of Directors of their power under the Articles of Association to allot the shares of the company. He has also found that there was no acceptance by the defendant of the invalid allotment and that in fact he repudiated having made any application, and he has further found that there has been no ratification of the invalid allotment by a competent authority.

A further defence has been set up that the Peshawar Bank had discharged the defendant by re-allotting these shares to Lala Sidhu Ram alone and accepting payment on his behalf from the Sindh Persian Gulf Trading Company with the result that this acceptance of performance of a promise by a third party had the effect under S. 41, Contract Act, of discharging the defendant from liability. This contention however was not accepted by the learned Subordinate Judge, who came to the conclusion that this

transfer was fraudulent and was merely one of several similar transfers of shares to nominal purchasers made by the directors of the Peshawar Bank in order to discharge themselves from liability to the creditors of the Bank which transfers, in addition, have been annulled by competent authority. The suit was dismissed on the ground that there had been no valid allotment, but considering that the defence raised had been dishonest, the Subordinate Judge left the parties to pay their own costs.

From this dismissal plaintiff Bank has appealed to this Court on six grounds, of which the first and third are to the effect that the allotment to the defendant was valid. This argument is based on certain proceedings in what purports to be the Minute Book of the Board of Directors of the Peshawar Bank of 20th November 1908, and 27th November 1908. On 20th November it is said that two Directors, Tulsi Ram and Sita Ram, were present and though at that time the Articles of Association had not been printed, it must be presumed that these two were competent directors and that they there and then made a valid delegation of the power of allotting shares to the General Manager, Lala Parmanand. Further, it is argued that this authority was sufficiently ratified in a further meeting held a week later, in which Thakar Singh was also present, representing himself and B. Mathra Das by proxy, together with Lala Tulsi Ram and Sita Ram, the three thus constituting a quorum of four, and at this meeting the previous minutes were read and confirmed. We do not consider that these proceedings effected a valid delegation of the powers of the Board of Directors in the allotment of shares. To begin with, there does not seem to be any record of any valid election of Lala Tulsi Ram and Sita Ram as directors at all. A company can only be formed by certain subscribers, and apparently the names of the subscribers were not ascertained at the time when the Articles of Association were sent to press.

The names have been written in later. The qualification of a director should be the holding in his own right of at least 100 shares. But neither Sita Ram nor Tulsi Ram had paid their allotment money on 20th November 1908; Sita Ram did not actually pay his till nearly



six months afterwards and Tulsi Ram only paid his in December 1908. Under the Act of 1882 governing these proceedings, until directors were validly elected the subscribers of the memorandum of association were deemed to be directors. The minimum legal number of these is seven and two would not constitute a quorum. The articles of association, Art. 83, adopted on 27th November prescribe that a quorum of the Board shall be four and although in any case it is difficult to understand how the directors could attend deliberations by proxy, it may be remarked that Art. 52, Articles of Association prescribes that a proxy shall not be taken into account in estimating a quorum. The result is that it is not shown that there has been any valid delegation of the power of allotting shares which power is reserved to the Board of Directors by Art. 12, Articles of Association. Late in argument it was suggested that Lala Parmanand became a director on 18th December 1911, apparently for the sole object of receiving this application and the promissory note, but the fact appears to be open to question and the suggestion seems to be an afterthought. We agree therefore with the first Court that there was no valid allotment of these shares to the defendant-respondent. Consequently there was no consideration for the promissory note.

In any case it was open to the defendant to revoke his application for the allotment of any shares, provided the revocation was anterior to the date of any valid allotment or ratification by the Board of Directors. Now this revocation was communicated to the Bank on 18th January 1912. But it is argued the Directors had already confirmed the allotment of these shares to Lala Madho Ram and in support of this argument our attention has been drawn to a note on the proceedings of 29th December 1911, to the effect that a loan of Rs. 15,000 be sanctioned to Messrs. Madho Ram and Sidhu Ram presumably to be applied to payment of the deposit on the purchase of these shares. It is difficult to avoid some scepticism as regards this entry, which appears to have been interpolated after the conclusions of the proceedings of that day and which could have been made at any time. Certainly it does not disclose the fact that any shares had been allotted to Lala Madho Ram and at the

meeting of 5th January 1912 it would appear that there was some question as to the proceedings of the previous week which were not in fact confirmed. An effort has been made to get out of this difficulty by subdividing the resolutions of the previous meeting by sub-headings in red ink. A minute book conducted on these lines can hardly pretend to command a high degree of confidence.

It may even be suspected that the Board of Directors of the Peshawar Bank existed merely for the purpose of ratifying the acts of the Manager, who had taken the precaution at the time that the Articles of Association were adopted to get himself appointed General Manager for the somewhat protracted term of twenty years (vide copy of Articles of Association). No valid ratification of any invalid allotment before revocation can be said to be proved. Considerable stress has been laid in argument on the fact that the defendant never questioned the validity of the constitution of the Board or of the allotment of shares in his favour, but contented himself with an unqualified denial that he had ever applied for any shares or executed any promissory note. On this point we can only say that the question was undoubtedly, argued at length in the first Court, that the defendant could hardly be expected to be acquainted with the intimate records of the Bank of Peshawar some three years before the date of this dispute, and that presumably he only discovered the defects of its proceedings when these were disclosed in evidence. Lastly, it must be added that the defendant still persists in the denial of execution of either the application for shares or the promissory note of 18th December 1911. Now undoubtedly the evidence of execution is very meagre and weak, especially as regards the promissory note. In fact the conclusion that these documents are genuine is entirely a matter of inference from the conduct of the defendant and possibly from that of Sidhu Ram. We notice that the promissory note was apparently produced by Sidhu Ram in March 1914 at a time when the Police had made their appearance at his house. His possession of the promissory note is probably explained by certain proceedings of 1913, when the former Directors of the Bank of Peshawar converted any liabilities of their own into liabilities of



an apparently fictitious Company to which the name of the Sindh Persian Gulf Trading Company was assigned. Sidhu Ram was never produced as a witness of the execution of either of the documents now in question. Paramanand, the only other witness, declines to say more than that these documents were signed by the defendant in his presence as far as he can remember.

There is no correspondence on the record indicating that any demand on the promissory note was made from the defendant Madho Ram or that he either admitted the existence of the promissory note or even had notice of its existence. He certainly repudiated his alleged application for shares by 18th January 1912. Although therefore there may be strong suspicion that these documents are genuine, it is difficult for us to regard the very qualified evidence of Paramanand alone and the action of Sidhu Ram as amounting to positive proof of the execution of these documents. At the same time we consider that the delay by Lala Madho Ram in repudiating his application, under the circumstances detailed by the Subordinate Judge, is a ground for the belief that he was engaged with Lala Parmanand in some negotiations as to the temporary disposal of these shares and that it took him some time to determine on his course of action. Under these circumstances we think that the Subordinate Judge's order in refusing him costs was justified. On the grounds given above we must dismiss this appeal, but on the view that we take of the defendant's conduct we also dismiss his cross-objections. We do not think that the appeal was justified. The liquidator must have become aware from the course of proceedings in the first Court of the flimsy character of the concern which called itself the Bank of Peshawar and must have been aware that whatever the conduct of the defendant Madho Ram, he did not in fact receive anything from these shares, which seem to have been worthless and which the Bank itself declared forfeited and endeavoured to allot elsewhere, and Madho Ram had not received any other consideration in return for the promissory note. We must therefore allow the respondent his costs in this Court.

R.M./R.K.

*Appeal dismissed.***A. I. R. 1919 Lahore 354**

MARTINEAU, J.

*Moti Ram*—Plaintiff—Appellant.

v.

*Sant Ram and others*—Defendants—Respondents.

Second Appeal No. 425 of 1919, Decided on 19th June 1919, from decree of Dist. Judge, Gurdaspur, D/- 9th December 1918.

**Transfer of Property Act (1882), S. 72—Mortgagee can carry out repairs—Costs are additional charge on property—Mortgagor if responsible for repairs—Mortgagee cannot repair without notice.**

Section 72 allows the mortgagee in the absence of a contract to the contrary to spend such money as is necessary for the preservation of the property and add it to the principal.

Where however there is a condition in a mortgage deed that the mortgagor is to be responsible for repairs the mortgagee is not entitled to do them himself without notice to the mortgagor and make the cost an additional charge on the property. [P 355 C 1]

*Fakir Chand*—for Appellant.*Chuni Lal Anand*—for Respondents.

**Judgment.**—The plaintiff has been given a decree for redemption of a shop and part of a house and the only dispute is as to whether the defendants are entitled to the costs of repairs, for which they claim Rs. 100. The first Court held that they were not and passed a decree for possession on payment of the mortgage-money, Rs. 650. On appeal the District Judge allowed them Rs. 100 on account of annual repairs. The plaintiff has appealed to this Court and the defendants have filed cross-objections asking for costs.

What the defendants claimed was not for the expenditure incurred on annual repairs but for specific repairs which they said they had carried out to the roof, platform and flooring. The Munsif found that they had failed to prove that they had done any such repairs and apparently the District Judge was of the same opinion. The defendants do not appear to be entitled to be reimbursed for expenditure on ordinary annual repairs for which they made no claim.

Moreover under the terms of the mortgage deed all repairs were to be done by the mortgagor. Counsel for the respondents contends that in accordance with S. 72, T. P. Act, his clients were entitled to spend such money as was necessary for the preservation of the property and add it to the principal. S. 72 however allows the mortgagee to do this only in



the absence of a contract to the contrary. Where as in the present case there is a condition that the mortgagor is to be responsible for the repairs, the mortgagee is not entitled to do them himself without notice to the mortgagor and make the cost an additional charge on the property. I accept the appeal, set aside the decree of the lower appellate Court and restore that of the first Court decreeing possession of the property on payment of Rs. 650 to the defendants. The defendants will pay the plaintiff's costs throughout. The cross-objections are dismissed.

R.M./R.K.

*Appeal accepted.***A. I. R. 1919 Lahore 355**

SCOTT-SMITH, J.

*Gurdit Singh* — Plaintiff—Appellant.  
v.

*Gujjar Singh and others*—Defendants  
—Respondents.

Second Appeal No. 1694 of 1918, Decided on 28th January 1919, from order of Dist. Judge, Lyallpur, D - 25th March 1918.

(a) Contract Act (9 of 1872), S. 130—Suit against surety alone is tenable.

A creditor is not bound to exhaust his remedy against the principal before suing the surety and a suit may be maintained against the surety, though the principal has not been sued. [P 356 C1]

(b) Contract Act (1872), Ss. 128 and 130—Surety under taking to pay on refusal by principal — Principal becoming insolvent before suit but after due date — Suit against surety alone—No formal demand to principal is necessary nor is creditor bound to prove his debt in insolvency—Cause of action arises on principal applying for insolvency.

One G executed a bond in favour of the plaintiff promising to pay on 27th April 1915, and the defendants became sureties for the repayment of this debt making themselves liable in case of refusal by the principal to pay. G. was adjudicated an insolvent on 11th December 1916 and on 7th July 1917 the plaintiff sued the sureties without impleading G.

*Held:* (1) that it was not necessary for the creditor to make a formal demand of payment from the principal debtor, nor was it incumbent upon him to prove his debt in insolvency.

[P 356 C]

(2) that the plaintiff had a good cause of action against the sureties, which arose when the principal debtor filed his application to be declared an insolvent. [P 356 C 2]

(3) that therefore the plaintiff was entitled to a decree against all the sureties; 48 I. C. 424; 87 I. C. 401 and 11 I. C. 911, *Foll.* 15 I. C. 469 and 16 I. C. 887, *Dist.* [P 356 C 2]

*Tek Chand* —for Appellant.

*Behari Lal* —for Respondents.

**Judgment.**—The facts of the case out of which the present second appeal arises are briefly as follows:—On 26th December 1914 Gulab, the principal debtor, executed a bond in favour of Gurdit Singh, plaintiff-appellant, promising to pay on the 10th Bisakh, Sambat 1972, which is equivalent to 27th April 1915. Gujjar Singh, Radha and Indar, defendants-respondents, were sureties for the payment of this debt and the condition in the bond was worded as under:—*Agar rupaiya dene men hisi kism ka inkar karun to tinon zamin rupaie ke zammewar hain. Sahukar unse wasult kar legewa.* This means that if the principal debtor shall make any refusal to pay, the sureties shall be liable to the creditor who may recover from them. On 7th June 1916 Gulab applied to be adjudicated an insolvent and on 11th December 1916 he was so adjudicated. The plaintiff filed the present suit against the three sureties without impleading the principal debtor on 7th July 1917. The lower Courts have dismissed the suit, holding that the sureties could not be sued without impleading the principal debtor. The learned District Judge gives his reasons as follows:

"As the liability of the sureties to pay a debt arises if the principal should fail to discharge it, the creditor cannot sue the sureties alone without making the principal a co-defendant. Further the sureties' liability to pay the debt was according to the terms of the bond not to arise till the principal should refuse to do so. A refusal by him was not proved. He did not pay because he became insolvent."

In second appeal it is contended that sureties for payment of a debt can be sued without making the principal debtor a party to the suit, and that it was not necessary in the present suit to prove that the principal debtor actually refused to pay. The facts that he did not pay by the date agreed upon and that he subsequently filed a petition to be declared an insolvent are sufficient to give the plaintiff a cause of action to sue the sureties. In *Brojendra Kishore Roy Chowdhury v. Hindustan Co-operative Insurance Society* (1) it was held by a Division Bench of the Calcutta High Court that

"a surety for a debtor becomes liable to the full extent of his obligation without being entitled to a notice as soon as the default of the prin-

(1) [1917] 44 Cal. 978=39 I. C. 705.



principal debtor is complete unless there is a special stipulation qualifying his obligation."

In my opinion the real meaning of the stipulation in the bond is that if the principal debtor makes default in payment according to the agreement the sureties shall be liable. I do not think it was necessary for the creditor to make a formal demand of payment from his debtor. It was the latter's duty to pay the debt as agreed upon and when he made default in payment the sureties became liable. In any case when Gulab filed his application to be declared insolvent, a cause of action arose against the sureties for Gulab's application was tantamount to a declaration that he could not pay his debts. With reference to the decision of the lower Courts that sureties cannot be sued alone without impleading the principal debtor, Bakhshi Tek Chand referred to a number of rulings including the following *Panna Lal v. Marwar Bank Limited*, *Hissar Ambala* (2), wherein is reported a decision of a Division Bench of this Court in Civil Appeal No. 2420 of 1913. At p. 432 (of 48 I. C.), col. 1, bottom, will be found the decision of the Court to the effect that there is sufficient authority for the proposition that in a case of this kind the creditor is not bound to exhaust his remedy against the principal before suing the surety and that a suit may be maintained against the surety though the principal has not been sued. The Court followed *Sankana Kalana v. Virupakshapa Ganeshapa* (3), *Lochhman Joharimal v. Babu Kandu* (4) and *Totakot Shangunni Menon v. Kurusingal Kaku Varid* (5). Again the Madras High Court in the case reported as *Parthasarathy Chetti v. Yelchoori Narayana Chetty* (6) has held that Ss. 128, 137 and 140, Contract Act, make it clear that a creditor has the right to proceed against a surety without exhausting his remedies against the principal debtor. The last section presupposes that the surety can be compelled to pay without the creditor resorting to the principal debtor for payment. Some of the same authorities were again relied upon as were referred to by this Court in the case reported as *Panna Lal v. Marwar Bank Ltd.*, *Hissar Ambala* (2).

The case most similar to the present however is one decided by the Nagpur Judicial Commissioner which is reported as *Gopal v. Ganpat* (7). In that case it was held that S. 16 (2), Provincial Insolvency Act, does not preclude a creditor from suing the surety of his insolvent debtor, even though the creditor has wilfully omitted to prove his debt in insolvency proceedings. The contingent liability of a surety, who has not been called upon to pay or has not in fact paid, forms a debt proveable in the bankruptcy of the principal debtor. There is no duty incumbent on the creditor to prove his debt in insolvency.

Similarly in the present case it is not incumbent on the present plaintiff to prove his debt in the insolvency proceedings. The sureties on the other hand could have protected their interests by proving their debt in those proceedings. *Sardar Tulsa Singh v. Nathu Singh* (8) and *Mathewson v. Ram Kanai Singh* (9) were referred to by the first Court, but in my opinion they are clearly distinguishable from the present case. I hold therefore that there is no authority for the proposition that in a case like the present the creditor cannot sue the sureties without also impleading the principal debtor. I further hold that the plaintiff had a good cause of action against the sureties. Indar, surety, confessed judgment, and it is difficult to understand why the suit was dismissed against him also. Gujjar Singh and Radha pleaded as payment of Rs. 50, but it has been held that no such payment is proved. The plaintiff is therefore, entitled to a decree for the sum claimed against all the sureties. I accept the appeal and setting aside the orders of the lower Courts give the plaintiff a decree for Rs. 590 with costs throughout against the defendants.

R.M /R K. *Appeal accepted.*

(7) [1911] 7 N. L. R. 122=41 I. O. 911.

(8) [1912] 15 I. O. 469.

(9) [1912] 16 I. C. 387.

### A. I. R. 1919 Lahore 356

RATTIGAN, C. J. AND MARTINEAU, J.

*Pallia*—Convict—Appellant.

v.

*Emperor*—Opposite Party.

Criminal Appeal Nos. 630 and 696 of 1918, Decided on 17th January 1919.

(2) [1918] 91 P. R. 1918=48 I. C. 424.

(3) [1882] 7 Bom. 146.

(4) [1869] 6 B. H. C. R. A. O. J. 241.

(5) [1868-69] 4 M. H. C. R. 190.

(6) [1917] 87 I. C. 401.



(a) Criminal P. C. (1898), S. 417 — Appeal against acquittal—For interference indications of guilt must be obvious.

The indications of the guilt of the accused must be obvious or the evidence too strong to be rejected before the High Court will interfere in an appeal against an order of acquittal: 7 P. R. 1904 Cr. and 46 I. C. 403, *Foll.*

[P 359 C 1]

(b) Evidence Act (1872), Ss. 114, III (b)—Retracted confession.

The retracted confession of an accused person may be sufficient corroboration of the approver's story as against himself but not against a co-accused. [P 358 C 1]

*Abdul Rashid and Muhammad Rafi*—for Appellant.

*Government Advocate*—for the Crown.

*Criminal Appeal No. 630 of 1918.*

**Judgment.**—Karima, a Gabol Biloch of Bet Mullanwala in the Muzaffargarh District, was murdered on the night of the 8th May last, his throat being cut while he was sleeping at a short distance from a wheat threshing floor near the Sonewala well. The persons who have been tried for the murder are Karima's wife Aziman who was sleeping on the same bed with her husband on the night of the murder his cousin Ahmad, who cultivated land at another well but was on the night of the murder sleeping at the gram threshing floor 15 karams from the well with Karima's brother Shera, and Pallia, a Biloch of the Bhathiara class. The learned Sessions Judge has convicted Ahmad and Pallia, but has acquitted Aziman. Pallia has appealed and there is also an appeal by the Government against the acquittal of Aziman. Ahmad has not appealed and his case is before us only under S. 374, Criminal P. C. for orders as to the confirmation of the death sentence.

It is alleged by the prosecution that Ahmad planned the murder with a view to marrying Aziman with whom he is said to have had an intrigue, and got Aziman's consent and also obtained the assistance of Pallia whom he is said to have helped in a love affair, and of Bacha (who has turned approver) whom he is said to have helped in an abduction. Bacha says that he and Pallia went to the Sonewala well at about midnight and were joined by Ahmad, who took a sword out of the bushes and led them to where Karima was sleeping; that Aziman was awake and got up and stood near the bed, and that he (Bacha) caught Karima by the head and Pallia caught him by the feet and Ahmad cut his throat with the

sword after which Ahmad went towards the well with the sword and Bacha and Pallia ran away. Karima's father Muhammadu who was sleeping at his house 11 karams from where his son was awakened by Aziman calling out that something had happened to her husband. He ran to the place and found Karima with his throat cut and Aziman standing near the bed. He questioned Aziman, and she said she did not know how her husband had been killed.

Muhammadu's brother Rahim Baksh was at his house at the Samundriwala well. He was informed by Ahmad of the murder and went to the spot. Aziman told him that she had been sleeping beside Karima and had woke up at the gurgling noise made by her husband. Rahim Baksh went to the Thana in the morning and reported the murder. Shera who was sleeping in one bed with Ahmad on the night of the murder, is an important witness. He says that he woke hearing his father Muhammadu cry out and saw Ahmad running from the direction of Karima's bed round the well towards him that he asked him what was the matter and that Ahmad said Karima was beating his wife.

Ghulam Rasul, who was sleeping near the gram threshing floor says that he woke and heard what Shera and Ahmad said to each other but did not know where Ahmad was at the time. Before the Magistrate however he said that he saw Ahmad coming quickly from the direction of the well. The sword with which the murder was committed was recovered from the Sonewala well on the 9th May, and the evidence of the Sub Inspector the Zaildar and the Lambardar shows that it was Ahmad who gave the information about the sword being in the well. Umra who went down the well and found the sword stated at the trial that it was Bacha who gave the information but that statement is inconsistent with his evidence before the Magistrate in which he had stated that it was Ahmad who said the sword was in the well. On the 16th May, when the case first came up before the Magistrate Aziman and Ahmad both confessed their guilt. Ahmad however exculpated Aziman who he said was asleep at the time of the murder. He also contradicted Bacha's statement as to the blow having been struck by him (Ahmad).



saying that it was Bacha who had the sword and killed Karima with it.

On the 8th July Aziman and Ahmad filed written statements through a pleader to the effect that they were innocent and had made the previous statements under the influence of the police. At the trial also they denied their guilt. Aziman reverted to her original story and said that she was asleep at the time of the murder that she heard a gurgling noise as though her husband had a nightmare and leant over and patted his chest that he did not speak and that she cried out to her father-in-law. She said that she had made her statement of the 16th May to the Magistrate under the instructions of the police Muhammadu and others.

As against Ahmad the approver's statement is corroborated by (1) Ahmad's retracted confession, (2) the evidence that the sword was found on the information given by Ahmad, and (3) Shera's evidence, referred to above. We are satisfied on this evidence that Ahmad is guilty and we confirm the sentence passed on him.

Against Pallia there is nothing to corroborate the approver's statement but the retracted confessions of Ahmad and Aziman in which Pallia, was mentioned as having taken part in the murder. Although these confessions can be taken into consideration against Pallia, their value is even less than that of the evidence of the approver since the persons making them could not be cross-examined or be punished for making false statements. Moreover we find on reference to the zinnis that the Sub-Inspector has made a mistake in saying in his evidence that Ahmad named Pallia on the evening of 9th May as having taken part in the murder. Ahmad gave an account of the murder on that day and named Bacha as having joined in it, but made no mention of Pallia then, and it was not till the 10th that he named him. This fact makes it the more unsafe to rely on Ahmad's confession of 16th May as against Pallia. In our opinion his and Aziman's confessions are not sufficient corroboration of the approver's statement as against Pallia, and the conviction of Pallia cannot therefore be sustained the case not being one in which the approver's statement can safely be accepted without corroboration. We accept Pallia's appeal and acquit him. Against Aziman the

only evidence to corroborate the approver is her retracted confession, and the learned Sessions Judge holds that it would be unsafe to rely on this in view of the fact that Aziman gives herself in the confession a minor and inactive part in the crime.

It is argued by the learned Government Advocate that Aziman could not have assigned to herself a more active part in the commission of the murder than she did and that her confession was made voluntarily. It appears to us however to be possible that pressure may have been brought to bear on Aziman, who is only 20 years old, to induce her to make a statement about the murder implicating herself. The learned pleader who has argued the case on her behalf has drawn attention to two facts in her favour. One is the presence of a good deal of blood on her clothes and person. At the time of the murder she was wearing a shirt, a ghagra and a dopatta. Blood was found on all by the Chemical Examiner and Nur Muhammad Khan; Lumbardar, says there was blood on all parts of Aziman's clothes. There was blood also on her face, and Nur Muhammad Khan further says (according to the vernacular record of his statement) that there was blood over the whole of her body. It is very doubtful whether such a quantity of blood would have spurted on to her body and clothes if she had been standing by the bed when her husband was murdered whereas if she was lying on the bed at the time it would be natural to find all her clothes and her person covered with blood.

The second important fact is that although after committing the murder Ahmad had only 29 karams to go to reach the well and another 15 karams to reach his bed (these distances are taken from the plan prepared by P. W. 16), he had not been able to get there when Muhammadu cried out, as is clear from Shera's statement that when he was awakened by his father crying out he saw Ahmad running towards him round the well. Muhammadu himself did not raise an outcry until he had run to Karim's bed (11 karams from where he himself was sleeping) on hearing Aziman call out. Consequently the murderers could have gone only a very few paces after committing the murder when Aziman gave the alarm, and this view receives support



from Ahmad's confession, in which he said he had gone 4 or 5 karams from Karim's bed when Aziman cried out. This appears to make it very improbable that Aziman can have been in the plot to murder her husband, for she would surely have taken care to give Ahmad sufficient time to return to his bed at the gram threshing floor before giving the alarm. We cannot agree with the suggestion of the learned Government-Advocate that Ahmad may have lingered near the well. Ahmad had merely to throw the sword into the well, and would have hurried on to get back to his bed as quickly as possible. The principles to be followed in dealing with appeals against order of acquittal are laid down in *King Emperor v. Chatter Singh* (1) and *Emperor v. Muhammad Shafi* (2). The indications of guilt must be obvious, or the evidence too strong to be rejected before the Court will interfere in such cases. In the present case the evidence against Aziman is by no means strong, and there appears to us to be a considerable doubt about her guilt, and we see no reason therefore for interfering with the order acquitting her. The appeal by the Local Government is accordingly dismissed.

*In Cr. A. No. 696 of 1918.*—The appeal is dismissed for reasons given in our judgment in Appeal No. 630 of 1918.

R.M./R.K. *Order accordingly.*

(1) [1904] 7 P. R. 1904 Cr.

(2) [1918] 25 P. R. 1918 Cr.=46 I. C. 403.

## A. I. R. 1919 Lahore 359

SHADI LAL, J.

*Kundan Lal*—Appellant.

v.

*Official Liquidator of Diamond Jubilee Flour Mills Co. Ltd. Delhi*—Respondents.

Misc. First Appeal No. 1489 of 1918, Decided on 31st July 1918, from order of Addl. Judge, Delhi, D/- 15th March 1918.

(a) Companies Act (6 of 1882), S. 169—Appeal—Service of notice after expiry of 3 weeks—Delay due to copying department and beyond control of party is reasonable cause—Time was extended.

Where a notice of appeal in the matter of the liquidation of a company was served upon the respondents after the expiry of the period of three weeks prescribed by statute and it appeared that the delay was due to a blunder on the part of the copying department and beyond the control of the appellant:

*Held:* that the time for the service of notice of appeal was rightly extended. [P 860 O 1]

(b) Company—Liquidation—Sale by private contract of property belonging to company in liquidation—Interests of creditors and contributories prejudiced—Price wholly inadequate—Sale held liable to be set aside.

In an appeal against an order sanctioning the sale of the Diamond Jubilee Flour Mills, Delhi, it appeared that the Mills were leased to the vendees for a period of three years commencing from 1st January 1917, one of the conditions of the transaction being that the lease could be determined by either party after giving six months' notice to the other, provided that the liquidator before resuming possession on the expiry of the period of notice should pay Rs. 5,000 to the lessees. In June 1917, the liquidator served a notice upon the lessees requiring them to quit the premises on 31st December 1917. On 8th October 1917 the Additional Judge, Delhi, asked the liquidator to withdraw the notice and even granted the request of the lessees that in lieu of their agreeing to the withdrawal of the notice the liquidator should be debarred from determining the lease in any case during its continuance for the remaining period. The District Judge rejected a higher offer than that of the vendees on the ground that they were already in possession and that possession could not be given to anybody else till the expiry of six months:

*Held:* (1) that the order allowing the lessees to remain in possession was wholly without justification, especially when there was no affidavit from the liquidator that the alleged compromise was beneficial to the persons interested in the winding-up;

(2) that the price being wholly inadequate, the sale by private contract to the vendees was detrimental to the interests of the creditors and contributories of the company and ought to be set aside. [P 860 C 1, 2]

*Govind Das and Ganga Ram*—for Appellant.

*Moti Sagar and Jagan Nath*—for Respondents.

**Judgment.**—This is an appeal against an order of the Additional Judge, Delhi, sanctioning the sale of the Diamond Jubilee Flour Mills in favour of Behari Lal-Bulaqi Das for a sum of Rs. 1,75,000. Mr. Moti Sagar for the respondents raises a preliminary objection that the notice of appeal having been served upon his clients after the expiry of the period of three weeks prescribed by S. 169, Companies Act, 6 of 1882, the appeal should be dismissed in limine. Now, an affidavit filed by Lala Dhampat Rai, pleader, on behalf of the appellant, furnishes an adequate reply to this objection, and leaves no doubt that the delay in presenting the appeal was due to a blunder on the part of the copying department, Delhi, and was beyond the control of the appellant. It appears that the vendees were impleaded as respondents some days after the institution of the appeal, but this was obviously the result of inad-



vertence on the part of the lawyer engaged by the appellant. Taking all the circumstances into consideration I hold that time for the service of notice of appeal has been rightly extended. Upon the merits I have, upon a careful consideration of all the proceedings taken by the Official Liquidator and the Judge in relation to the sale of the property, reached the conclusion that the sale by private contract to the vendees is detrimental to the interests of the creditors and contributories of the company, and that the price is wholly inadequate. It is not seriously contested by Mr. Moti Sagar that the property is worth much more than Rs. 1,75,000; indeed, one firm actually offered Rs. 2,20,000, but this offer and other offers were rejected on the ground that the vendees were already in possession of the Mills, and that:

"possession cannot under any circumstances be given till the expiry of six months and that it is possible that possession may be indefinitely postponed if the lessees insist on their rights under the amended terms of the lease."

In view of the above argument used by the learned Judge for rejecting the higher offers, I consider it necessary to set out briefly the relevant facts about the lease and the alleged amendment in the terms thereof. It appears that in September 1916 the Mills were leased to the vendees for a period of three years commencing from 1st January 1917, and one of the terms of the transaction was that the lease could be determined by either party after giving six months' notice to the other, subject to the proviso that the liquidator before resuming possession on the expiry of the period of notice should pay Rs. 5,000 to the lessees. It is beyond dispute that the liquidator served in the month of June 1917 a notice upon the lessees requiring them to quit the premises on 31st December 1917. Now, if this notice had remained in force, the lessees would have vacated the premises at the end of the year, and there could have been no conceivable reason for rejecting the offer of Rs. 2,20,000 made in March 1918. It however appears that the learned Judge intervened on 8th October 1917 and asked the liquidator to withdraw the notice on the ground that on account of stringency of the money market "it would be a foolish proceeding" to sell the Mills at that time. I have no hesitation in holding that this was a most unfortunate order, and the

reason given for making it appears to me to be wholly wrong. Indeed, the subsequent events show that the order has actually been utilized by the lessees for obtaining a favourable bargain for themselves and causing loss to the persons interested in the liquidation. There cannot be the slightest doubt, that the price of the machinery has gone up on account of the war, and it is common knowledge that there is a keen competition among business men for purchasing mills and that this competition has naturally led to a considerable rise in the prices. The learned Judge did not however content himself with the cancellation of the notice, but even went so far as to accord his assent to a grasping request made by the lessees that in lieu of their agreeing to the withdrawal of the notice the Official Liquidator should be debarred from determining the lease in any case during the continuance of the lease for the remaining period, but that they should be allowed the option to put an end to the lease by giving six months' notice to the official liquidator. Now, it is perfectly clear that the lessees were anxious to remain in possession of the property, that the cancellation of the notice was beneficial to them, and that they would have agreed to the cancellation without any quid pro quo. There was therefore absolutely no justification for acceding to their demand, more especially when there was no affidavit from the liquidator that the alleged compromise was beneficial to the persons interested in the winding up.

No formal document has yet been drawn up containing the modified terms, and the question as to whether the alleged modification is binding upon the liquidator and the parties concerned in the liquidation is not before me and need not be determined. It is however to be observed that the Additional Judge himself, in an order passed on 28th February 1918, made the following observations:

"Circumstances have also arisen which call for a reconsideration of the matter before ratifying by formal deed executed by the official liquidator the modified terms as to the continuance of the lease. The position in the absence of such a formal deed is governed by the terms of Cl. J., of the lease and under it the official liquidator has in my opinion power to give the lessees six months' notice to quit subject to their being paid Rs. 5,000."



In spite of this expression of opinion it is strange that when certain contributories represented to the learned Judge that the price offered by the lessees was inadequate and that the mills be sold by public auction, he passed an order of the 12th March referring to the alleged right of the lessees to hold possession for the full period of three years, and called upon the contributories

"to produce some person or persons who, fully knowing all the circumstances as I have explained them, is or are still prepared to make an offer of (as the applicants state) two and a half to three lacs,"

and fixed three days for the purpose of their producing the would-be purchasers. I cannot help remarking that this order was unfair to the contributories, and was calculated to frighten persons who were likely to purchase the property. There cannot be the slightest doubt that it was the learned Judge's action in cancelling the notice of ejection and subsequently according his assent to the proposed modification in the terms of the lease which was availed of for the purpose of granting a concession to the lessees and rejecting an offer made by another firm, which offer would have given the liquidator Rs. 45,200 in excess of the price for which the property has been sold to the lessees. I cannot endorse a transaction of this nature and must set it aside. Accordingly I accept the appeal and quashing the order sanctioning the sale direct the parties to bear their own costs in both the Courts. It is open to the lower Court to take proceedings for the sale of the property by public auction after issuing the proper proclamation. It seems to me that in order to realise a proper price it is necessary to adjudicate upon the rights of lessees and to determine their lease, which has all along operated as an obstacle in the way of the sale of the property for an adequate price.

Some doubt has been thrown upon the competency of an Additional Judge to exercise the special jurisdiction conferred by the Indian Companies Act, the reason of the doubt being that the statute confers the jurisdiction upon the "District Court" and does not contemplate an assignment of proceedings by the latter to the Court of an Additional Judge. It is necessary to make a pronouncement upon the subject, but it is desirable that the validity of the proceedings should no

longer be open to doubt. Accordingly I order that the proceedings in the liquidation of the Diamond Jubilee Flour Mills Co. be hereafter conducted by the District Judge, Delhi.

R.M./R.K.

*Appeal accepted.*

### A. I. R. 1919 Lahore 361

CHEVIS AND BROADWAY, JJ.

*Emperor.*

v.

*Nathu Ram and others—Respondents.*

Criminal Appeal No. 116 of 1919, Decided on 27th March 1919, from order of First Class Magistrate, Gurdaspur, D/-15th January 1919.

**Companies Act (7 of 1913), S. 104—Failure to furnish return of allotment of shares to Registrar—Ignorance is no excuse—Default if not wilful penalty should not be heavy.**

Under S. 104 (1) (a) the Directors and Manager of a Company are bound to furnish to the Registrar the return of allotment of shares, and their failure to do so renders them liable to the penalties provided by sub-S. (3) of that section. A plea of ignorance of the provisions of the law in this respect cannot be accepted as an excuse for failing to comply therewith. Where however the default is not intentional, but is due to negligence alone, the full or a heavy penalty ought not to be exacted. [P 362 C 2; P 363 C 1]

*Herbert—for Appellant.*

*Gokal Chand Narang—for Respondents.*

**Judgment.**—Nathu Ram Varma, Managing Director of the Batala Bank, Limited, Munshi Ram Sharma, Manager, and Megh Raj, Pleader, Halas Rai, Merchant and Rai Sahib Karam Chand, Directors of the said Bank, were proceeded against under S. 104 (3), Companies Act (7 of 1913), for having failed to comply with the provisions of S. 104 (1) (a) of the said Act. Rai Sahib Karam Chand died and the remaining persons were acquitted by the trying Magistrate on 15th January 1919. Against this order of acquittal the Local Government has preferred this appeal, and we have heard the learned Government Advocate in support while Mr. Gokal Chand Narang has addressed us on behalf of the four respondents. The Bank of Batala, Limited, was registered under the Indian Companies Act, 1882, on 7th May 1913, as a Company having a share capital and the four respondents were the officers of the said Bank. Its first Balance sheet was issued for the year ending on 31st December 1913, and showed that 550 shares had been allotted. On 1st April 1914 the present Indian Companies Act, 7 of 1913,



came into force and by S. 104 (1) (a) of this Act it was enacted that:

"Section 104 (1): Whenever a company having a share capital makes any allotment of his shares, the company shall, within one month thereafter, (a) file with the Registrar a return of the allotments, stating the number and nominal amount of the shares comprised in the allotment, the names, addresses and description of the allottees, and the amount (if any) paid or due and payable on each share. . . . .

A Balance Sheet was issued by the Bank for the half year ending on 30th June 1914, in which the number of shares that had been allotted was shown as 555. The provisions of S. 104 (1) (a), Act 7 of 1913, had however not been complied with. For the year ending on 30th June 1915 the Bank issued another Balance Sheet in which the number of shares allotted was given as 558. Here again S. 104 (1) (a), Act 7 of 1913, has been ignored. The Registrar however took no action in the matter. Subsequently Balance Sheets were issued for the years ending on 30th June 1916 and on the 30th June 1917, the number of shares allotted being entered in each case as 558. In the Balance Sheet that was issued for the year ending on 30th June 1918 however the number of shares allotted was shown as 735, an increase of 177 shares within the year under reference. These 177 shares were allotted as under:

On 30th October 1917	...	17
On 13th January 1918	...	152
On 19th February 1918	...	8
Total ...		177

but the returns of these allotments were not filed with the Registrar till 25th October 1918, when they had been requisitioned by that officer. There had thus been a default in complying with the requirements of S. 104 (1) (a), Act 7 of 1913.

The case for the Crown was, and is, that by reason of their default the respondents had rendered themselves liable to the penalties imposed by S. 104 (3), Act 7 of 1913, which runs as follows:

"(3) If default is made in complying with the requirements of this section, every officer of the company who is knowingly a party to the default shall be liable to a fine not exceeding Rs. 500 for every day during which the default continues."

The respondents while admitting that the provisions of S. 104 (1) (a), Act 7 of 1913, had not been complied with, pleaded (1) that the Directors were not responsible for the default inasmuch as it

was not their duty but the duty of the manager to furnish the said returns, and (2) that in any event the default was not an intentional one and was due only to their ignorance of the provisions of the new Act, the former Act of 1882 not having any corresponding provision in it.

The trying Magistrate held, rightly, that the "default and negligence" were "quite patent," but acquitted the respondents, holding that the use of the word "knowingly" in S. 104 (3) of the Act excused not only ignorance on matters of fact but ignorance of law as well. Mr. Herbert for the Crown contended that this view was incorrect and that ignorance of law could not be pleaded by the respondents as an excuse. He argued that as the respondents must be presumed to know the law, they must be held to have knowingly taken part in the omission to comply with it. He further contended that the Directors and Managers of the Bank were bound to see that the provisions of the law were complied with and were bound therefore to see that the necessary returns were submitted. In support of this latter contention he referred to *Tota Ram v. Emperor* (1) and *Tota Ram v. Emperor* (2). There can be no doubt that it is the duty of the Directors and the Managers of a Company to furnish the returns that are necessary under S. 104 (1) (a) of the present Act. The first contention therefore of the respondents is untenable, and they must be held liable unless they are able to show that they are excused by their ignorance of the law. Seeing that the Act had been in force since 1st April 1914 and further having regard to the fact that one of the respondents is a pleader, it is obvious that the plea of ignorance of the law cannot be accepted. The respondents must be held to have known that on the allotment of the shares in question the law required a return of the allotment to be forwarded to the Registrar.

Doubtless if they or any one of them could show as a matter of fact that they or he were or was not aware of the default and could show circumstances to justify the conclusion that as a matter of fact they or he believed that the returns required had been sent, the penalty could not be exacted. In the present case the

(1) [1916] 14 P. R. 1916 Cr.=34 I. C. 962.

(2) [1916] 18 P. R. 1916 Cr.=35 I. C. 482.



only real plea is that they were unaware of the provisions of the law on this subject, and this excuse cannot be accepted: *Chhabil Das v. Emperor* (3). In these circumstances it must be held that the respondents were knowingly parties to the default and have therefore rendered themselves liable to the penalties provided by S. 104 (3), Act 7 of 1913. At the same time it is not necessary to exact the full or any heavy penalty. The default was not an intentional one but due to negligence alone and had the respondents thought fit to move the proper Court under the proviso to sub-Cl. 3, S. 104, they might have had the time extended. We therefore think that a fine of Rs. 25 in all payable by each of the respondents will meet the case and accepting this appeal, we convict the respondents under S. 104 (3), Act 7 of 1913, and sentence each of them to pay a fine of Rs. 25.

R.M./R.K.

*Appeal accepted.*

(3) A. I. R 1914 Lah. 125=23 I. C. 508=17  
P. R. 1914 Cr.

### A. I. R. 1919 Lahore 363 (1)

RATTIGAN, C. J.

Ghulam Muhammad—Appellant.

v.

Karta Ram and others—Respondents.

Misc. First Appeal No. 2240 of 1918,  
Decided on 19th May 1919, from order  
of Dist. Judge, Ludhiana, D/- 10th May  
1918.

**Insolvency—Appeal—Receiver in possession of property—Application for release of property dismissed—Appeal without impleading Receiver is not maintainable.**

The appellant was declared an insolvent under the Provincial Insolvency Act, and a Receiver was appointed who took charge of all the property belonging to the insolvent, including two houses. One of the houses was released for the residence of the receiver and the other was ordered to be sold, whereupon the insolvent applied for the release of this house also as it was required for his residence. The application was disallowed and the insolvent appealed to the High Court without impleading the Official Receiver as a party.

**Held:** that the appeal must fail, inasmuch as the Official Receiver being in possession of the property of the insolvent was a necessary party to the appeal. [P 363 C 2]

Shamir Chand—for Respondents.

**Facts.**—Gulam Muhammad, the appellant, was declared an insolvent by the Insolvency Court of Ludhiana and a Receiver of his property was appointed. The Receiver took possession of all the property of the insolvent. The insolvent

had two houses. The Court released one for the residence of the Receiver and ordered the other to be sold. The insolvent filed an objection that this house was necessary for his residence and should be released. The District Judge disallowed the objection, whereupon the insolvent appealed to the High Court to have that house released. Lala Shamir Chand, for the respondents, took a preliminary objection that the receiver was a necessary party and that as he had not been made a party and limitation had expired, the appeal could not proceed. He also contended that the sanction of the District Judge or the High Court had not been obtained under S 46, Insolvency Act, and the appeal therefore could not be entertained.

**Judgment.**—This appeal must fail, as the Official Receiver who is in possession of the property was a necessary party to it and has not been impleaded as a respondent. So far as he is concerned, any appeal would be barred by limitation as against him and unless he is to be affected by this appeal, any order passed by this Court would be infructuous. I notice also that the permission of this Court for the filing of this appeal was neither asked for nor granted: S. 46 (3), Provincial Insolvency Act. Appeal dismissed. No order as to costs.

R.M./R.K.

*Appeal dismissed.*

### A. I. R. 1919 Lahore 363 (2)

SHADI LAL AND LEROSIGNOL, JJ.

Qyamuddin—Plaintiff—Appellant.

v.

Delhi Flour Mills Co. Ltd. — Defendant—Respondent.

Second Appeal No. 1257 of 1918, Decided on 7th August 1918, from decree of Dist. Judge, Delhi, D/- 4th February 1918.

**(a) Court-fees Act (1870), S. 7 (1)—Suit for recovery of money due after adjustment of account—Ad valorem court-fee is payable.**

According to S. 7, cl. (1) the fee payable in a suit for money must be according to the amount claimed. Where plaintiff sued for the recovery of Rs. 1,125-4-0, alleged to be due to him after deducting a sum of Rs. 2,500 (said to be due by him to the defendant on account of the price of certain goods) from Rs. 3,625-4-0, which he assessed as the amount of damages suffered by him by reason of the defendant's failure to perform certain contracts entered into between the parties:

**Held:** that the court-fee paid ad valorem on the amount actually claimed was sufficient.

[P 364 C 1]



(b) Court-fees Act (1870), Sch. 1, Art. 1 — Applicability.

Article 1, Sch. 1, applies only to those cases which are not otherwise provided for under the Act. [P 364 C 1]

*Abdur Rashid and Muhammad Rafi* —for Appellant.

*Moti Sagar*—for Respondent.

**Judgment.**—The sole question for determination in this appeal is whether the plaintiff has correctly valued the relief claimed by him and whether the court-fee affixed to the plaint and the memorandum of appeal to the lower appellate Court is adequate. The action brought by the plaintiff was for the recovery of a sum of Rs. 1,125 4-0 and on that amount he has admittedly paid *ad valorem* court-fee. The plaint however shows that the plaintiff arrived at the amount after deducting a sum of Rs. 2,500 (said to be due by him to the defendant on account of the price of certain goods) from Rs. 3,625-4-0, which he assessed as the amount of damages suffered by him by reason of the defendant's failure to perform certain contracts entered into between the parties.

The learned District Judge holds that the bone of contention between the parties is the amount of loss said to have been suffered by the plaintiff, and that the credit allowed by him to the defendant should not be taken into consideration for the purpose of determining the court-fee to be levied upon the plaint. We are unable to concur in this view. S. 7, Cl. (1), Court-fees Act, prescribes that the fee payable in a suit for money must be according to the amount claimed. Now, the plaintiff has, as stated above, paid the court-fee in accordance with this clause, and we are not prepared to hold that Art. 1, Sch. 1 of the Act, which provides that a plaint or a memorandum of appeal should bear court-fee on the amount or value of the subject matter in dispute, militates against his contention. It is to be observed that this article applies only to those cases which are not otherwise provided for under the Act.

There can be no manner of doubt that in determining the sum to be awarded to the plaintiff, the Court has to adjudicate upon the amount of the loss sustained by the plaintiff on account of the breach of contracts; but we do not think that that amount should determine the value for the purpose of court-fee. Indeed there

are many suits, e. g., those for the rendition of accounts between parties or between principals and agents or suits involving cross-demands, in which the Court has to adjudicate upon various large items in dispute between the parties, though the actual amount claimed by the plaintiff is a comparatively small sum of money. In all these suits it is the amount claimed by, or decreed to, the plaintiff which determines the court-fee leviable on the plaint, and not the various sums which may be the subject-matter of controversy between the parties and upon which the Court may have to record its findings before arriving at the final conclusion.

For these reasons we are of opinion that the court-fee is sufficient and that the lower appellate Court's decree must be discharged. We accordingly accept the appeal, and setting aside the decree of the District Judge remand the case for rededecision. The court-fee on the memorandum of appeal shall be refunded, and other costs shall abide the event.

R.M./R.K.

*Appeal allowed.*

### \* A. I. R. 1919 Lahore 364

BEVAN-PETMAN, J.

*Waryam Singh and others*—Plaintiffs  
—Appellants.

v.

*Narain Das* — Defendant — Respondent.

Second Appeal No. 2098 of 1918, Decided on 17th May 1919, from decree of Dist. Judge, Hoshiarpur, D/- 7th May 1918.

\* (a) Civil P. C. (1908), O 21, Rr. 58, 61 and 63—Attachment is not alienation—It does not give cause of action for suit for declaration until property is sold—Custom (Punjab), Alienation.

An attachment cannot be regarded as an alienation of the property attached. It may infringe the right of the judgment-debtor but does not give a cause of action to his reversioners.

•[P 366 C 2]

Under customary law a suit for a declaration at the instance of the reversioners does not lie when ancestral property has been merely attached in execution of a decree with a view to sale but has not been sold: 18 P. R. 1908, (F. B.), Dist. [P 366 C 2]

(b) Civil P. C. (1908), S. 60, O. 21, Rr. 58, 61 and 63—Objection to attachment disallowed—Suit for declaration that debts were immoral and not binding on sons and that house being of agriculturists is exempt—House not being sold suit was premature—Suit is partly under R. 63—Order under



**R. 61 does not bar suit under Specific Relief Act (1 of 1877), S. 42.**

In a suit for a declaration that a certain house was not liable to attachment and sale in execution of a decree against the plaintiffs' father it appeared that the plaintiffs had filed objections under O. 21, R. 58, claiming that they were in possession as owners. The claim having been disallowed they filed the present declaratory suit, alleging that the land was ancestral, that they had built certain of the houses, that the debts contracted by their father were without consideration and necessity and that the houses were exempt from attachment and sale by virtue of S. 60 (1) (c) :

*Held* : (1) that the plaintiffs' suit was undoubtedly in part one under O. 21, R. 63, but that they were not because of an order under O. 21, R. 61 of the Code, incompetent to institute a suit for a declaration under the provisions of S. 42, Specific Relief Act; [P 365 C 2; P 366 C 1]

(2) that the house in suit not having been sold, the plaintiffs' suit was premature : 11 W. R. 40 and 35 Cal. 202 (P. C.), Dist. [P 366 C 1]

*Fakir Chand*—for Appellants.

*Nand Lal*—for Respondent.

**Judgment.**—In the present case the facts necessary to state are that certain houses of one Dewa Singh, an agriculturist and the father of the appellants, were attached in execution of a decree against him. Dewa Singh objected and claimed exemption for the houses under S. 60 (1) (c), Act 5 of 1908, but his objection was disallowed. His sons, the present appellants, also filed objections under O. 21, R. 58, Civil P. C., claiming that they were in possession of the property attached as owners. Their claim was disallowed and they then instituted a declaratory suit alleging that their claim had been wrongly disallowed, that the land was ancestral that they had built certain of the houses which therefore belonged to them, that the debts contracted by their father, a drunkard, were without consideration and necessity and that the houses were exempt from attachment and sale by virtue of S. 60 (1) (c), Civil P. C., and a declaration to the effect that the houses were not liable to attachment and sale was prayed for.

The Munsif, treating the case as one under the customary law, held that the houses had not been built by the plaintiffs and that the debts incurred by Dewa Singh were not immoral but holding the houses were those of an agriculturist he declared that certain of the houses were not liable to attachment and sale. The lower appellate Court held that the question of the debts being immoral and

without necessity and consideration did not arise, because the houses had not yet been sold and the suit was not one for a declaration under the customary law, that the decision in *Jagdip Singh v. Bawa Narain Singh* (1) was inapplicable inasmuch as Dewa Singh was alive, that the houses had not been built by the plaintiffs, that no claim of joint ownership with Dewa Singh had been made and that the plaintiffs had no locus standi to claim the exemption relating to houses of agriculturists, because only a judgment debtor was competent to do so and it therefore accepted the appeal.

In this Court a large number of points have been argued at length. In my view of the case it is not necessary to deal with them all however interesting they may be. It is contended that the suit was one under O. 21, R. 63 and it was not competent for the plaintiffs to sue on the basis of any claim other than the claim which had been disallowed under O. 21, R. 61 and in support of this contention reference is made to *Colvin Cowie v. Mrs Barbara Owen Julia Elias* (2). But this decision does not support the contention. In that case as in this the claim was of a two fold nature, one based on the statutory right given to institute a suit when a claim in execution has been disallowed and the other a claim for a declaration. It was admitted and held in that case that the claim in a suit based on that statutory right must be substantially the same right as that for which the party had contended in the execution proceedings, but it was nowhere held that under such circumstances a claim to a declaration was not competent. On the contrary the claim was considered and was dismissed merely on the ground that in that particular case there was no cause of action such as entitled the plaintiffs to the declaration which they sought, because the defendant had never by any act of his impugned or disturbed the title which the plaintiffs were setting up in their suit. The present case falls under the same category. The plaintiffs had in their plaint, set out the facts relating to the disallowance of their claims and undoubtedly their suit was in part one under O. 21, R. 63, but that is no ground for holding that they were because of an order under O. 21, R. 61, incompetent

(1) [1918] 4 P. R. 1918=15 I. Q. 866,

(2) [1869] 11 W. R. 40.



to institute a suit for a declaration under the provisions of S. 42, Specific Relief Act.

Reference is also made to *Abdul Kader v. Ali Meah* (3) and to *Phul Kumari v. Ghanshyam Misra* (4). In the latter case the question related to the proper court fee for a suit under S. 283 of Act 14 of 1882, which section relates to the same matter as O. 21, R. 63 and their Lordships of the Privy Council found that fortunately the object and nature of that suit was not dubious and that the suit was one "to alter or set aside a summary decision or order." Their Lordships explained that:

"It is true that instead of asking the Court to alter or set aside the decree which is the cause of action, she categorically asks from the Court the several decrees which she had asked from the Subordinate Judge and which the Subordinate Judge had refused. But this is merely a verbal or formal difference and S. 283, Civil P. O., under which section the action is brought recognises such a suit as not merely an appropriate but the only mode of obtaining review in such cases."

This decision is, I think easily distinguishable. The claims in the two Courts were the same and it was expressly found in that particular case and for the reasons stated that the suit was one under S. 283. The facts here are different. The claim disallowed was one based solely on possession by virtue of ownership. The judgment in *Abdul Kader v. Ali Meah* (3) takes the matter no further. In that judgment reference is made to the above decision, and it is explained that the summary decision in a claim case is confined to a consideration of the possession of the judgment-debtor at the time of the attachment and that any other discussion in such a decision is material only so far as it is relevant to the determination of that essential matter. It was pointed out that in both Courts the claim related to possession.

In my opinion the lower appellate Court clearly erred in holding that the suit was not one under customary law. Not only does this appear from the plaint but throughout the proceedings in the first Court the suit was treated as of that nature and the issues and evidence were directed to that end. But in my opinion the appeal must fail on the ground that the suit was premature and such was the decision of the lower appellate

Court when it briefly remarked that the houses had not yet been sold. No authority has been given that under customary law a suit for a declaration will lie when ancestral property has been merely attached in execution of a decree with a view to sale but not sold. In *Sadhu Singh v. Secy. of State* (5) the property had been both attached and sold. An attachment cannot be regarded as an alienation. It may be argued that an attachment infringes the right of a judgment-debtor but does this give a cause of action under customary law to the reversioners? I am not aware of any such right. For the above reasons I dismiss the appeal with costs.

R.M./R.K. *Appeal dismissed.*

(5) [1908] 18 P. R. 1908 (F.B.).

### A. I. R. 1919 Lahore 366

MARTINEAU, J.

*Rampur State Sugar Factory*—Defendant—Appellant.

v.

*Diwan Chand Ishar Das*—Plaintiffs—Respondents.

Second Appeal No. 117 of 1919, Decided on 24th March 1919, from decree of Dist. Judge, Amritsar, D/- 26th October 1918.

Contract Act (1872), Ss. 5, 6 and 7—Proposal and acceptance—Revocation when complete, illustrated.

In a suit for recovery of a certain sum of money as damages for alleged breach of contract to supply 500 bags of sugar, it appeared that in reply to the plaintiffs' letter on 1st February 1915 the defendants intimated their rates, whereupon the plaintiffs telegraphed on 4th February their acceptance subject to their approval of the samples which they asked the defendants to send, and confirmed the telegram by a letter of the same date. The samples were sent and reached the plaintiffs on the 11th, on which date the defendants sent a telegram to the plaintiffs saying that they could not hold stock after that evening and asking them to wire instructions. This telegram was not delivered to the plaintiffs as the address they gave had not been registered. On the same date, the defendants sent the plaintiffs a letter in confirmation of the telegram. On 13th February the plaintiffs sent earnest-money and wrote to the defendants that they would send instructions the next day. The defendants, on the same date, wrote informing the plaintiffs that they could not hold stock for them and refused the earnest-money sent by the plaintiff.

*Held:* (1) that, there had been no unqualified acceptance by the plaintiffs of the defendants' offer up to the time when the latter sent their telegram on 11th February; (2) that, inasmuch as the defendants' telegram did not reach the plaintiffs in consequence of the latter's own misrepresentations about their telegraphic address, the plaintiffs must be deemed in law to have

(3) [1912] 14 I. C. 715.

(4) [1908] 35 Cal. 202=35 I. A. 22 (P.C.).



received information of the defendants' revocation of their proposal on that date; (3) that, consequently, the plaintiffs' claim could not succeed.  
[P 367 C 2; P 368 C 1]

*C. Bevan Petman*—for Appellant.

*Moti Sagar*—for Respondents.

**Judgment.**—In this case an Amritsar firm has sued the Rampur State Sugar Factory for Rs. 1,000 as damages for the non-delivery of 500 bags of sugar. A decree has been passed in favour of the plaintiffs and has been upheld by the District Judge. The defendants have filed a second appeal in this Court. The question in the case is whether there was a complete contract between the parties for the delivery of 500 bags of sugar. In reply to a letter of 1st February 1915 from the plaintiffs asking the defendants whether they would reduce their rates for sugar, the defendants on 3rd February intimated the rate they would accept. The plaintiffs telegraphed on 4th February that they accepted 500 bags at the rate mentioned subject to the approval of the sample which they asked the defendants to send, and confirmed the telegram by a letter of the same date. The defendants wrote on 6th informing the plaintiffs that they were sending the samples. The samples were sent and are said to have reached the plaintiffs on the 11th. The defendants sent the following telegram to the plaintiffs on the 11th. "Received firm offer for sugar. Cannot hold stock for you after this evening. Wire." That telegram was addressed to "Bawa, Amritsar," which had been mentioned in the plaintiffs' letters as their telegraphic address, but it was not delivered because the plaintiffs had not had the address registered at the telegraph office.

The defendants sent a letter to the plaintiffs on the same date in confirmation of the telegram, but the plaintiffs have not produced it though they were given a notice to do so. On 13th February the plaintiffs sent a money order for Rs. 100 less one rupee commission through their dealers to the defendants on account of earnest money and wrote on the same date informing the defendants of this and saying that they would send instructions about the sugar the next day. The defendants on the same date wrote informing the plaintiffs that they could not hold stock for them, and that previous correspondence regarding the

rates should be considered as null and void. They refused the money order sent by the plaintiffs. The learned District Judge holds that the plaintiffs' letter of the 13th February amounted to an unqualified acceptance of the proposal contained in the defendants' letter and telegram of the 3rd, and that there had been no valid revocation of that proposal by the defendants. With regard to the defendants' telegram of the 11th, he says that it was admittedly undelivered and that the revocation of the proposal could be complete against the plaintiffs only when it came to their knowledge. With regard to the letter of the same date, he says that there is nothing to show that the plaintiffs received it before sending their letter of the 13th, that the letter itself would not show when it was received, and that the plaintiffs were not asked to produce the envelope from which this fact might be determined. He, therefore, considers that no inference adverse to the plaintiffs can be drawn from their not producing the letter.

The case hinges on the defendants' telegram and letter of the 11th February, in which they informed the plaintiffs that their offer would hold good only up to the evening of that day. Admittedly there had been no unqualified acceptance of the offer up to that time, as the plaintiffs had accepted it only subject to the approval of the sample. Therefore, if the defendants' revocation or qualification of their original offer came to the knowledge of the plaintiffs before the plaintiffs sent their letter of the 13th, the claim must fail. Now, with regard to the letter of 11th February the mistake which the learned District Judge makes is in assuming that the letter itself would not show when it was received. It is quite likely that when the plaintiffs received it, they may have noted on it the date of its receipt or made some endorsement which would show on what day it was received. This would account for their not producing the letter, and there is no reason for not drawing the natural presumption from their failure to produce the letter which they were given notice to produce, namely, that if it had been produced it would have shown that they received it on the 12th. The presumption is all the stronger because a letter posted at Rampur on the 11th would, in the ordinary course of events, have been delivered at Amritsar the next



day. As regards the telegram sent by the defendants on the 11th this also, although their learned counsel did not argue the point, appears to me to be alone a sufficient answer to the plaintiffs' claim, since it was in consequence of the plaintiffs' misrepresentation that the telegram did not reach them. In their letters to the defendants they wrongly stated "Bava, Amritsar" to be their telegraphic address. Had they not done so, the defendants would have addressed the telegram to the plaintiffs by name, and it would in the ordinary course have been delivered to the plaintiffs on the 11th. Supposing that the defendants had sent a registered letter to the plaintiffs revoking their offer and the plaintiffs had refused to accept the letter from the postman, or supposing that the plaintiffs had received the defendants' letter, but allowed it to remain unopened, could the plaintiffs' plead that they were ignorant of the revocation have been entertained? Clearly not. The defendants did all that was in their power to inform the plaintiffs that their offer would hold good only till the evening of the 11th February, and it was entirely owing to the plaintiffs' misrepresentation about this telegraphic address that the defendants' telegram was not delivered. In these circumstances the plaintiff must be deemed in law, though not in actual fact, to have received the information on the 11th February. There was consequently no complete contract between the parties, and it is unnecessary to go into the question whether it was also essential for the plaintiffs to send Rs. 500 as earnest money to make the contract complete. I accept the appeal, reverse the decrees of the Courts below, and dismiss the suit with costs throughout.

R.M./R.K.

*Appeal accepted.***A. I. R. 1919 Lahore 368**

SCOTT-SMITH AND DUNDAS, JJ.

*Ahmad Jan and another*—Plaintiffs—Appellants.

v.

*Kishen Chand and others*—Defendants—Respondents.

Second Appeal No. 2370 of 1917, Decided on 23rd June 1919, from decree of Dist. Judge, Ludhiana, D/- 30th June 1917.

(a) Punjab Pre-emption Act (1913), S. 3  
(5) (a)—Sale by judgment-debtor in virtue of

certificate under O. 21, R. 83 (2) is private sale and not sale by Court.

A sale of property executed by the judgment-debtor in virtue of a certificate granted to him by the executing Court under O. 21, R. 83 (2), is a private sale, and, even though it does not become absolute until confirmed by the Court, it cannot be said to be a sale by a Court in execution of the decree and thus not liable to pre-emption: 1 I. C. 474 and 8 I. C. 777, *Dist.*

[P 369 C 1]

(b) Pre-emption — Waiver — Failure to outbid purchaser at auction is not waiver.

Failure of a person entitled to pre-empt to outbid the purchaser at an auction sale does not amount to waiver.

[P 369 C 1]

*Kunwar Narain for Shah Nawaz*—for Appellants.

*Hargopal for Faqir Chand*—for Respondents.

**Judgment.**—This is a second appeal from the order of the District Judge of Ludhiana, upholding the order of the Court of first instance dismissing the suit of the plaintiffs for pre-emption, on the grounds: (1) that the sale took place in execution of a decree, and that therefore there can be no pre-emption having regard to S. 3 (5) (a), Punjab Pre-emption Act 1 of 1913, and (2) that the plaintiffs waived their right to pre-empt because they were present at the time when the property was sold and failed to purchase it. The property of which pre-emption is sought was privately sold by the judgment-debtors in virtue of a certificate granted to them by the executing Court under O. 21, R. 83 (2), Civil P. C. Counsel for the respondents supports the order of the lower Courts by reference to *Piars Lal v. Ganeshi Lal* (1) and *Nawab v. Jawaya* (2). In the first of these two cases the sale was by a receiver under directions of the Court, and the case is obviously distinguishable from the present one. In the second case also it was held that the sale actually took place in execution of the decree. In *Baroda Kanta Bose v. Chunder Kanta Ghose* (3) it is said:

A sale in execution differs in many essential particulars, as need hardly be said, from a sale inter partes. It is not a sale by the owner of the property, but by a Court which has a statutory power conferred upon it of transferring the interest of the judgment-debtor to the purchaser, and to that end a certain course of procedure is prescribed terminating with the sale certificate, which confers on the persons named therein his title.

(1) [1904] 46 P. R. 190 = 1 I. C. 474.

(2) [1910] 40 P. R. 1911 = 3 I. C. 777.

(3) [1905] 29 Cal. 682.



In the present case the Court stayed its hand and gave the judgment debtors a certificate authorizing them to raise the amount due privately by mortgage, lease or sale. The sale which took place in consequence of this was a private one, and even though it did not become absolute until confirmed by the Court, it could not, in our opinion, be said to be a sale by the Court in execution of the decree. It has been argued that the sale was really by the Court, as it was by the judgment-debtors as agents of the Court. We are unable to accept this argument. In our opinion the Court gave opportunity to the judgment-debtors to raise the money due from them in any way they could by transfer of their property. We therefore hold that the suit for pre-emption is not barred by S. 3 (5), Punjab Pre-emption Act.

The next question is that of waiver. The private sale was conducted by auction. The plaintiffs made a bid at that auction; but refrained from bidding up against the actual purchaser. The rulings are conflicting as to whether such conduct constitutes waiver. In *Mula v. Nihal Chand* (4) it was held that the failure of a person entitled to pre-empt to outbid the purchaser in a sale in execution of the decree did not amount to waiver, and in *Shah Bodhraj v. Sundar Singh* (5) the Judges doubted whether omission to bid at auction amounted to waiver. A similar view was expressed in *Muhammad Bakhsh v. Sardar Rajindar Singh* (6), but a contrary one was taken in *Mohomed Baksh v. Hira* (7), *Rullia Mall v. Dulo Mal* (8) and *Chithru Singh v. Bhagwant Singh* (9). In our opinion it cannot be said that the plaintiffs have waived their claim.

There is no reason why they should bid at the auction, and in this way enhance the price. We see no reason why they should not have stood by and waited to see what the actual price obtained was, and then have made their claim to pre-empt. As a matter of fact this is what they actually did, for a few days after the sale they sent a notice to the purchaser offering to pay him the actual price. We hold that there has been no

waiver in the present case. The existence of the custom of pre-emption has not been admitted in this case, and there has been no decision on this point by either of the lower Courts. We therefore accept the appeal, and setting aside the orders of the lower Courts remand the case to the Court of first instance for re-decision on the merits. Stamp in this and the lower appellate Court will be refunded and other costs will be costs in the cause.

R.M./R.K.

Case remanded.

## A. I. R. 1919 Lahore 369

BROADWAY, J.

*Man Singh and another*—Appellants.

v.

*Mt. Santi and others*—Respondents.

Misc. First Appeal No. 46 of 1919, Decided on 31st March 1919, from order of Dist. Judge., Ludhiana, D/- 3rd December 1918.

(a) Probate and Administration Act (1881), S. 23—Applicant showing prima facie beneficial interest in estate—He has right to ask to be appointed to administer estate.

In the grant of Letters of Administration it is not usual to go into the question of title but when an applicant shows that he or she has some beneficial interest, prima facie, in the estate sought to be administered, it would give that person a right to ask to be appointed to administer the estate. [P 371 C 1]

(b) Probate and Administration Act (1881), S. 23—Disputes regarding ownership or succession which can be settled by regular suit—Letters should not be granted.

Letters of Administration should not be granted to any one when the dispute as to the ownership of or succession to the property left by the deceased can only be settled by a regular suit; 42 I. C. 797, *Foll.* [P 371 C 1]

One J gifted certain land to his stepson N. On N's death his son S succeeded him and on his death without issue the property was held by his widow. On the death of the widow the sister of S. applied for Letters of Administration. The collaterals of J objected, claiming to be entitled to the reversion of the property inasmuch as the family of the original donee had died out.

*Held*: (1) that the objectors, not being collaterals of the last male owner, were not prima facie entitled to the reversion of the property in the presence of his sister who was a descendant of the original donee; [P 371 C 1]

(2) but that the question whether the sister was the rightful heir should be decided in a regular suit and that therefore the sister was not entitled to the grant of Letters of Administration. [P 372 C 1]

*Nand Lal*—for Appellants.*Fakir Chand*—for Respondents.

**Judgment.**—This is an appeal against an order of the District Judge at Ludhiana.

(4) [1881] 7 P. R. 1851.

(5) [1885] 100 P. R. 1835.

(6) [1898] 121 P. R. 1893.

(7) [1872] 47 P. R. 1873.

(8) [1876] 7 P. R. 1876.

(9) [1918] 46 I. C. 106.



ana dated 13th December 1918, by which letters of administration to the estate of one Santa have been granted to Mt. Santi, the deceased's sister. The estate to which administration is sought consists of agricultural land, some house property and some moveables. The present appellants who object to the grant of these letters of administration to Mt. Santi are the collaterals of one Jiwna. This Jiwna gifted the land in question to his stepson, Naraina. On Naraina's death he left a son named Santa and a daughter named Santi, the present respondent. Santa succeeded to his father's estate and on his death without issue the property was held by his widow Mt. Nand Kuar. The widow having died, Mt. Santi has filed this application for letters of administration. The objectors, the present appellants, claim that as the collaterals of Jiwna, the original donor, they were entitled to the reversion of these lands inasmuch as the family of the original donee had died out. They also apparently claimed, though this is not quite clear, that the property was ancestral.

Mr. Nand Lal for the appellants urged (1) that Act 5 of 1881 did not govern the parties. He had very little to say on this point, merely asserting that as Jats the parties were not Hindus. He was asked for an authority for this proposition but he had to admit that he had none. I have no hesitation in holding that Act 5 of 1881 is applicable. The next ground taken was that Mt. Santi was not a fit person to be entrusted with the letters of administration. What this precisely means has not really been explained, and I can see nothing on the record that would lead me to think that Mt. Santi was not fit to be appointed administratrix of the estate of her brother. The third ground was that the application was not competent. There is absolutely no reason given for this proposition and I have no hesitation in holding that the application was competent.

Next it was urged that Santa being the last male holder and having died without issue, his sister Mt. Santi was not the heir and that the property reverted to the collaterals of the original donor. In this connexion my attention was drawn to *Mt. Jannat v. Abdulla* (1).

(1) [1916] 4 P. R. 1916=32 I. C. 817.

The other grounds of appeal do not need any specific reference. In *Mt. Jannat v. Abdulla* (1) it was held by a Division Bench of this Court that the presence of sisters of the last holder of donated property does not prevent its reversion to the donor's family notwithstanding that they are daughters of the original donee. A reference to that ruling shows that it was arrived at after the consideration of *Gurdit Singh v. Mt. Prem Kuar* (2) and *Mt. Jannat v. Abdulla* (1) was decided on other points. This question therefore may be regarded as obiter. In *Tani v. Tara Chand* (3) it was held by a Division Bench of this Court that there is no reversion to the collaterals of a donor so long as descendants of the donee, whether in the male or female line, are existing. This decision proceeded on *Gurdit Singh v. Mt. Prem Kuar* (2) and *Lachman v. Bhagwan Sahai* (4), both of which decisions were decisions of Division Benches of this Court and clearly lay down the proposition enunciated in *Tani v. Tara Chand* (4). It would seem therefore that prima facie the present appellants would not be entitled to the reversion of this property.

Mr. Faqir Chand pointed out that there had been former litigation between the same appellants and Santa and in which the question as to whether this property was ancestral or not was decided against the present appellants. Mr. Nand Lal informed me that the parties were not the same and that all the present appellants were not concerned in the former suit, which had been ultimately decided by a Division Bench of this Court. An examination of the two records however discloses the fact that Mr. Nand Lal was wrong and that the parties in the present case were precisely the same as those in the former case so far as the present appellants are concerned, i. e., that the present appellants are either the same or the legal representatives of those concerned in the former suit. As the present matter relates to the same land, prima facie at any rate, the former suit decided the question as to the ancestral nature of the property against the present appellants. Mr. Fakir Chand also referred me to *Muhammad Yar v. Malik*

(2) [1909] 84 P. R. 1909=3 I. C. 604.

(3) [1918] 82 P. R. 1918=47 I. C. 373.

(4) [1911] 68 P. R. 1911=10 I. C. 277.



*Umar Hayat Khan* (5), in which it was held that in the absence of collaterals a sister or sister's son had a right of succession. Mr. Nand Lal contended that this decision had no bearing on the issue in the present case; but in this I differ. In the grant of letters of administration it is not usual to go into the question of title but when an applicant shows that he or she has some beneficial interest, *prima facie*, in the estate sought to be administered, it would give that person a right to ask to be appointed to administer the estate. A sister is therefore a possible heir in certain circumstances and in the present case the appellants are not collaterals of the last male holder of this estate and claim only to be reversioners of the original donor. They can only claim if the property were to revert to the descendants of the original donor. *Prima facie* therefore it seems to me that Mt. Santi is entitled to the grant of letters of administration. It was contended that as a matter of fact there would be no estate to be administered, but it seems to me that this contention is untenable. The property certainly exists and the applicant Mt. Santi certainly has some claim (the extent of this claim I specifically do not decide) to succeed to the estate. She has thus an interest in the proper administration of the estate and therefore can be regarded as a fit and proper person to be appointed. In this view I am supported by *Nishikant Chatterjee v. Ashutosh Mookherjee* (6). Mr. Nand Lal, however, raised another point which needs consideration. He contended that when action is taken under Act 5 of 1881 merely as a device to obtain a decision on a question of title which could properly be settled in an ordinary suit, letters of administration should not be granted. In support of this contention he referred me to *Lakshmi Narayan Chatterjee v. Nanda Rani Debi* (7), *Parsania v. Hari Charan Dass* (8), *Prosonno Kumari Debi v. Ram Chandra Singha* (9) and *Budhu v. Ram Sarup* (10).

The first of these cases does not appear to me to have any bearing on the point. These letters of administration had been granted and the estate had been adminis-

tered fully and an application had been made by the person appointed to administer the estate under S. 92, Act 5 of 1891 and it was held that such an application should not be granted inasmuch as the estate had already been fully administered. This decision was, however, followed in *Parsania v. Hari Charan Dass* (8), which dealt with property left by a Mahant. This Mahant had left a family and the family was in possession of the properties. A Chela of the Mahant applied under Act 5 of 1881 for a certificate to be granted to him. It was held that the Mahant was not the owner of the property and that, therefore, a person claiming to be his successor in office could not make an application under Act 5 of 1881. It was further stated that there was no estate to be administered in that case. In *Prosonno Kumari Debi v. Ram Chandra Singha* (9) it was also held, approving *Lakshmi Narain Chatterjee v. Nanda Rani Debi* (7) and *Parsania v. Hari Charan Dass* (8) that where there is no estate which stands in need of administration and an application for letters of administration is a transparent device to secure from the probate Court a decision upon a contested title to the estate, there is no occasion for the grant of letters of administration. *Budhu v. Ram Sarup* (10) was a decision of this Court in which it was held that where the deceased left no property except a house and the dispute as to the ownership of the house could only be settled by a regular suit, it was not necessary to grant letters of administration to anyone. Now it cannot be denied that in the present case there is a dispute as to the ownership of or succession to the property left by Santu. The learned Judge appears to have been to a very great extent influenced by the decision in the former litigation and appears to have held that the present appellants cannot possibly hope to succeed to this estate and that on the other hand Mt. Santi, the present applicant, is the proper person entitled to get the property. In fact this seems to me to be apparent from the proceedings, for I find that he drew up the following point for determination:

"Has not Mt. Santi got a preferential right to get possession over the property left by Mt. Nand Kour widow of Santa?"

There has been no proper inquiry and it would seem that the learned District Judge did not consider it necessary to

(5) [1918] 65 P. R. 1918=45 I. O. 924.

(6) [1914] 23 I. O. 296.

(7) [1909] 8 I. O. 287.

(8) [1912] 16 I. O. 598.

(9) [1910] 17 I. O. 155.

(10) [1917] 42 I. O. 787.



allow the parties to lead any evidence, although there is nothing on the record to show that either party desired to produce any evidence. It is probable that Mt. Santi is the rightful heir but it seems to me that this is a question which should be decided in a regular suit and that, therefore, *Budhu v. Ram Sarup* (10) should be followed. I, therefore, accept this appeal and set aside the order of the learned District Judge, leaving it to the parties to bring a regular suit as they may be advised. I note, however, that both the learned counsel claimed that their respective clients are in actual possession of the property in dispute. In the circumstances I leave the parties to bear their own costs in this Court.

R.M./R.K.

*Appeal accepted.***A. I. R. 1919 Lahore 372 (1)**

SCOTT-SMITH AND BROADWAY, JJ.

*Ganga Pershad* — Defendant — Petitioner.

v.

*Megh Raj* — Plaintiff — Opposite Party.

Civil Revn. No. 45 of 1915, Decided on 30th May 1918, against decree of Sr. Sub-Judge, Kangra, D/- 12th October 1914.

**Hindu Law—Religious endowment—Temple—Suit to recover share in temple offerings is maintainable.**

A suit to recover a definite sum of money alleged to be due to the plaintiff as his share in the offerings of a temple is maintainable.

[P 372 C 2]

*Hari Chand* — for Petitioner.*Ganpat Rai* — for Opposite Party.

**Judgment.**—In this case *Megh Raj*, plaintiff-respondent, sued *Ganga Pershad* defendant-petitioner for the sum of Rs. 110, alleging that to be due to him on account of his share in the birt of the Nagarkot temple at Bhawan. He averred that he the defendant and Mt. Ishri had been cosharers in the said birt up to the death of Mt. Ishri, which took place in the earthquake in 1905, that subsequent to her death he and the defendant had been cosharers in the said birt and had been taking their respective shares, but that from May 1909 to May 1912 the defendant alone had been realising the offerings and had not paid the plaintiff his moiety. The plaintiff estimated the three years' income at Rs. 300 and allowing Rs. 80 as expenditure, he claimed Rs. 110 as his half share. The Courts below held: (1) that the parties were cosharers in this

birt, and (2) that the defendant had realised the offerings during the period in suit which amounted to Rs. 300 but had not paid plaintiff his half share. The plaintiff was accordingly granted a decree for the amount he claimed.

*Ganga Pershad* has preferred this petition of revision against the said decree and the only point for determination is whether the present suit lay. Counsel for the petitioner has referred us to *Kanshi Chundra v. Kailash Chandra* (1) *Gour Mani Debi v. Chairman of Panihat Municipality* (2), *Dwarka Nath Misser v. Ram Protap Misser* (3) and *Mugjoo Paudaen v. Ram Dyal* (4). These decisions are however clearly distinguishable inasmuch as in them it was held that a suit for a declaration that a person was entitled to a share in religious offerings of this nature did not lie. In the present case *Megh Raj* does not ask for such a declaration but claims a definite amount due to him as a cosharer in the said birt. The Courts below having held that he was a cosharer during the period in question we are of opinion that the suit lies. This petition for revision is accordingly dismissed with costs.

R.M./R.K.

*Petition dismissed.*

(1) [1899] 26 Cal. 356.

(2) [1910] 6 I. C. 864.

(3) [1911] 10 I. C. 41.

(4) 15 W. R. 531=8 B. L. R. 50.

**A. I. R. 1919 Lahore 372 (2)**

BROADWAY, J.

*Mt. Ram Kaur* and others—Defendants—Appellants.

v.

*Partab Singh* and others—Plaintiffs—Respondents.

Second Appeal No. 3 of 1918, Decided on 18th July 1918, from decree of Dist. Judge, Amritsar, D/- 26th November 1917.

**Transfer of Property Act (4 of 1882), S. 63—Mortgagee after period of redemption making repairs bona fide believing to be owner—Mortgagor must pay costs on redemption.**

In the case of a mortgage by way of conditional sale, the mortgagee has a reasonable ground to entertain a bona fide belief that, after expiry of the period stipulated for redemption, there is no intention on the part of the mortgagor to redeem, and that he is therefore the owner of the property. If the mortgagee improves the property subsequent to the date fixed for redemption, it is equitable that the mortgagor, while retaining the benefit of the improve-



ment, should pay its cost at the time of redemption. [P 373 C 2]

*Fakir Chand*—for Appellants.

*Badr-ud-din Kureshi*—for Respondents.

**Judgment.**—This appeal has arisen out of a suit for redemption of the shop which was mortgaged on 9th January 1873 for Rs. 400. The mortgagees in addition to the mortgage money claimed a sum of Rs. 600 for improvements and Rs. 528 on account of annual repairs. The trial Court found that the mortgagees had constructed a second storey at a cost of Rs. 327, and that the annual repairs had cost Rs. 68. Holding that the mortgagees were entitled to be paid these amounts, a decree for redemption was passed in favour of the plaintiffs on payment of a sum of Rs. 795. The plaintiffs thereupon preferred an appeal to the learned District Judge objecting to the payment of the two items of Rs. 327 and Rs. 68. The learned District Judge, holding that the mortgagees were not entitled to these sums, reduced the amount payable on redemption to Rs. 400.

Against this decision the mortgagees have preferred this second appeal, and on their behalf I have heard Mr. Fakir Chand while Mr. Badr-ud-din has addressed me on behalf of the respondents. The mortgage-deed contained a clause relating to a conditional sale: If the mortgage was not redeemed within five years, the transaction was to be regarded as a sale. The mortgagees have been in possession ever since 1873 and it was contended by Mr. Fakir Chand that they acted in the bona fide belief that they were the owners after 1873, and on that assumption had improved the property. He claimed that his clients were entitled to be repaid the amount of their outlay as well as the amount expended by them on the annual repairs. A reference was made to *Shepard v. Jones* (1) as well as *Gansham v. Budha* (2). In *Shepard v. Jones* (1) it was held that if upon the hearing of a redemption suit the mortgagee proves that he has laid out money in lasting improvements, which improvements have improved the property to the extent of the money laid out, he will get the sums so laid out. In *Gansham v. Budha* (2) it was held that where the

mortgagee of a plot of land built a house on the land without any objection on the part of the mortgagor, although the mortgagor gave no actual consent, the mortgagor, while being entitled to redeem, must pay the mortgagee a fair and reasonable sum for the house. As against this Mr. Kureshi referred me to *Shepard v. Jones* (1) and *Gansham v. Budha* (2). In the Punjab case it was held that the mortgagee was entitled to make a reasonable charge for moneys expended by him on ordinary repairs but that he was not entitled to claim for alterations or improvements made by him without having obtained written permission from the mortgagor. In the Madras case, which proceeded on S. 72 (b), T. P. Act, it was held that that section did not permit a mortgagee in possession to effect improvements and that consequently the costs of such improvements could not be legally charged against the mortgagor who sought to redeem.

The present case can, I think, be distinguished from *Mt. Bhaqwanti v. Mela Mal* (3), and *Arunachela Chetti v. Sithaya Ammal* (4), for here the mortgage was by way of a conditional sale. After 1878 the mortgagees might reasonably claim to have had a bona fide belief that there was no intention on the part of the mortgagors to redeem, and that they were therefore the owners of this property. The improvement to the house is clearly of a permanent nature and has, undoubtedly, increased its value. The value now is, no doubt, in excess of the actual amount of the outlay on it and it seems to me equitable that the mortgagors, while retaining the benefit of this improvement, should at least pay its cost. Qua the annual repairs the learned District Judge has found that the mortgagees have failed to prove that they had carried out the repairs claimed, and this being a question of fact cannot be now questioned in second appeal. I accordingly accept this appeal, in so far as to allow the plaintiffs-mortgagors to redeem this house on payment of Rs. 400 plus the costs of the improvements only, viz., Rs. 327, or a total of Rs. 727. In the circumstances however the parties will bear their own costs in this Court.

R.M./R.K. *Appeal partly accepted.*

(3) [1903] 33 P. L. R. 1903.

(4) [1896] 19 Mad. 327.

(1) [1882] 21 Oh. D. 469.

(2) [1876] 119 P. R. 1876.



## A. I. R. 1919 Lahore 374 (1)

SHADI LAL, J.

*Mahna Singh and others*—Defendants—Appellants.

v.

*Ladha Singh and another*—Plaintiffs—Respondents.

Misc. Second Appeal No. 2232 of 1917, Decided on 15th March 1918, from order of Dist. Judge, Lahore, D/- 14th July 1917.

Punjab Limitation (Ancestral Land Alienation) Act (1 of 1900)—Applicability.

The Punjab Limitation (Ancestral Land Alienation) Act is applicable to a suit, whether brought for declaration or for possession, provided that the alienor has died after the commencement of the Act. [P 374 C 2]

*Santanam and Moti Ram*—for Appellants.*Moti Sagar and Brij Lal*—for Respondents.

**Judgment.**—On 1st October 1878 one Buta Singh, a collateral of the plaintiffs, sold 51 ghumaons six kanals and 15 marlas of land with a proportionate share in the shamilat to the father of the defendants; and the mutation with respect to the alienation was effected on 17th March 1886. Buta Singh died at the end of 1916 and the present suit for possession was instituted on 10th February 1917. The Subordinate Judge dismissed the suit as barred under the provisions of the Punjab Lim. Act 1 of 1900, taking the date of the mutation as the terminus a quo for the limitation prescribed by that statute. The learned District Judge on appeal has upheld the finding of the Court of first instance with respect to 51 ghumaons six kanals and 15 marlas of land, but as regards the share in the shamilat has remanded the suit for rededecision after an inquiry into the following issues:

(1) "whether mutation of shamilat land was made in favour of the vendee and if so when; and (2) if no mutation was made whether the vendee took possession of the shamilat land and if so when."

Now the present record contains full information upon the first question, and I have no hesitation in holding that the claim with respect to the shamilat land is equally barred. The mutation order of 17th March 1886, when read with the reports of the Patwari and Girdawar Kanungo, leaves no doubt whatever that the entire land including the proportionate share of the shamilat formed the subject-matter of the mutation. Indeed

the khatas of the shamilat affected by the sale are distinctly mentioned in the reports, and the entries to be made with respect to those khatas are also specified. Further there can be little doubt that the vendee obtained possession of the entire property transferred to him by the sale-deed. The period of limitation therefore began to run in 1886, and the suit, which was instituted in 1917, was clearly barred by time. Mr. Moti Sagar for the plaintiffs argues that the Punjab Limitation Act was not intended to have retrospective effect, and relies in support of his argument on the judgment of the Full Bench in *Sahib Dad v. Rahmat* (1). But that ruling is clearly distinguishable, because in that case the alienor had died before the Act came into force. As stated above Buta Singh, the vendor, died in 1916, after the enforcement of the Act, and it was then that the plaintiff's cause of action for possession arose. Indeed it has been repeatedly held that the aforesaid Act is applicable to a suit, whether brought for declaration or for possession, provided that the alienor has died after the commencement of the Act, vide inter alia, *Rasul Bakhsh v. Nabi Bakhsh* (2), *Jamal-ud-din v. Khuda Bakhsh* (3) and *Atar Singh v. Allah Din* (4). For these reasons I hold that the Subordinate Judge was right in dismissing the suit as barred by time. Accordingly I accept the appeal and setting aside the order of the lower appellate Court dismiss the suit with costs throughout.

R M./R.K. *Appeal accepted.*

(1) [1901] 90 P. R. 1904.

(2) [1906] 91 P. L. R. 1906.

(3) [1907] 44 P. L. R. 1907.

(4) [1913] 18 I. C. 445.

## A. I. R. 1919 Lahore 374 (2)

MARTINEAU, J.

*Harbans Lal*—Plaintiff—Petitioner.

v.

*Nathu and another*—Defendants—Opposite Parties.

Civil Revn. No. 862 of 1918, Decided on 24th January 1919.

Limitation Act (9 of 1908), S. 20—Payment of interest by principal debtor—Limitation is extended against surety.

The liability of a surety being co-extensive with that of the principal debtor, the benefit accruing to a creditor under S. 20 is not restricted against the payer alone, but is enforceable against any one liable for it. [P 375 C 1]



Therefore, a payment of interest by the principal debtor within the period of limitation gives a fresh starting point for limitation against the surety under S. 20. [P 375 C 2]

*Faquir Chand*—for Petitioner.

**Judgment.**—The only question in this case is whether a payment of interest by the principal debtor within the period of limitation gives a fresh starting point for limitation against the surety under S. 20, Lim. Act. The lower Court has held, following *Gopal Daji v. Gopal* (1), that it does not, and has passed a decree for the amount due to the plaintiff against defendant 1, the principal debtor, alone, dismissing the suit against the surety Nathu as time barred. In the case followed by the lower Court the learned Judges said in their judgment that the principal was not the person liable to pay the debt of the surety, so that, even if the payment of interest could be regarded as a payment of interest on the debt of the surety, still it was not made by a person liable to pay the surety's debt, and on this ground they held that the payment did not give a fresh starting point for limitation against the surety. With all respect I am unable to agree with the view of the learned Judges of the Bombay High Court. Although both the surety and the principal are liable to pay the debt to the creditor, there is only one debt and the debt due from the surety cannot be treated as a debt distinct from that due from the principal. The liability of the surety is co-extensive with that of the principal debtor, as laid down in S. 128, Contract Act.

The decision of the Bombay High Court has been dissented from by the Madras High Court in *Velayudam Pillai v. Vaithyaliam Pillai* (2), in which it is remarked that S. 20, Lim. Act, does not restrict the benefit accruing to the creditor to his remedy against the payer alone, but that, according to the language of the section, the debt being kept alive, the result must be to make it enforceable against any one liable for it. A similar view was taken in England in *Frisby, In re, Allison v. Frisby* (3) in construing S. 8, Real Property Lim. Act, 1874. S. 20, Lim. Act, provides that where interest on a debt is before the expiration of the prescribed period paid as such by

the person liable to pay the debt, or by his agent duly authorized in this behalf, a fresh period of limitation shall be computed from the time when the payment was made. The section does not lay down that the period is to be computed from the date of payment only as against the principal debtor or the person making the payment. The creditor is, in my opinion, entitled to the benefit of the section against any person liable for the debt. I hold therefore that the suit in the present case is within time against the surety. I accept the application and alter the decree to one for Rs. 698 and costs against both the respondents. The respondent Nathu will pay the petitioner's costs in this Court.

R.M./R.K.

*Petition accepted.*

### A. I. R. 1919 Lahore 375

RATTIGAN, C. J. AND ABDUL RAOOF, J.  
*Bahal Singh and another*—Convicts—Appellants.

v.

*Emperor*—Opposite Party.

Criminal Appeal No. 811 of 1918, Decided on 7th February 1919, from order of Sess. Judge, Lahore, D/- 13th November 1918.

Penal Code (45 of 1860), Ss. 34, 109, 302 and 325—Attack by the two persons with deadly weapons—One giving fatal blow alone is guilty of murder—Other is guilty under S. 325 read with S. 109.

Where two persons armed with deadly weapons make an attack upon another and it is proved that death was caused by a blow inflicted by only one of them, both cannot be convicted of the offence of murder under S. 302, read with S. 34; to make both equally liable for the murder it ought to be established that both of them struck the deceased. The one who struck the blow is guilty of murder and the other, who must have known that grievous hurt would in all probability be caused is guilty of having abetted an offence under S. 325, read with S. 109.

[P 379 C 1, 2; P 380 C 1]

*Morton, Beechey and Nand Lal*—for Appellants.

*Mul Chand*—for the Crown.

**Judgment.**—Four men, namely Bahal Singh, Mula Singh, Dhara Singh and Fateh Singh, were committed to the Court of Session on a charge of murder of one Dula Singh under S. 302, I. P. O. The two latter, i. e., Dhara Singh and Fateh Singh, were acquitted by the learned Sessions Judge, who convicted the two first, namely, Bahal Singh and Mula Singh, and sentenced them to death. Both of them have filed appeals

(1) [1904] 28 Bom. 248.

(2) [1912] 17 I. O. 619.

(3) [1889] 48 Obs. D. 106=61 L. T. 682.



to this Court and the case has also come up before us under a reference under S. 374, Criminal P. C., for the confirmation of the sentence of death passed upon them.

The case as set up on behalf of the prosecution was that the families of Mohkam Singh and Wir Singh were not on good terms. Mohkam Singh had three sons, Fateh Singh, Bahal Singh and Mula Singh, and a daughter, Mt. Kisso. Dhara Singh, the accused No. 3 in the case, is the son of Bahal Singh. Wir Singh's family is represented by Labh Singh, Kehr Singh, Sher Singh, Kunden Singh and Dula Singh, the five sons of Wir Singh. Labh Singh has two sons, Gurdit Singh and Ranjit Singh. It is alleged that Gurdit Singh entered the house of Mohkam Singh's family with the object of having sexual intercourse with Mt. Kisso. A complaint was filed against Gurdit Singh in the Court of the Tahsildar of Chunian under S. 451, I. P. C. There were several adjournments of the hearing of this case. One of the dates fixed for the hearing of this case was 22nd July 1918, and a day previous to this, i. e., on 21st of July 1918, Gurdit Singh along with his father, Labh Singh, left the village of their residence, namely Chak No. 24, in order to attend the Court of the Tahsildar of Chunian. It appears that the other brothers of Labh Singh did not reside in this village but they had their residences elsewhere. On account of this feud with the family of Mohkam Singh, Labh Singh was in constant fear of molestation and injury from the members of Mohkam Singh's family. For this reason Dula Singh and Kehr Singh, who lived in a village called Jamsher, had been called and requested to stay with Labh Singh's family to be of use and help to them. Therefore they had for some time been living in Labh Singh's house. It is stated that when leaving for the Court of the Tahsildar of Chunian Labh Singh told his wife, Mt. Kishen Kaur, to lock the door of the compound and requested his neighbour, Wadhawa Singh, also to look after his family during his absence. Labh Singh had left in the morning.

About midday Kehr Singh went out of the house to get fodder. Mt. Kishen Kaur was left in the house with Dula Singh, who was sleeping on a charpoy under a shed. At about 2-30 p. m. it is

stated, Bahal Singh climbed over the wall and came into the compound of the house with a gandasa in his hand. The other accused, Mula Singh, Fatteh Singh and Dhara Singh, also came in immediately after. Mt. Kishen Kaur called out to Dula Singh who, having got up from his bed, was assailed by the accused persons with gandasas and dangs. Dula Singh was killed on the spot. Mt. Kishen Kaur tried to run away but she was caught by the accused, Dhara Singh, while climbing a ladder and was pulled down. She was compelled to hand over the key of the compound to the assailants. The door was opened and certain other persons were also admitted into the house. She was lifted by Indar Singh, one of the men who had just been let in, and Dhara Singh, who took her out of the house, threw her upon a heap of manure, tore her clothes and maltreated her. When the accused had left the house she returned to her compound and found Dula Singh lying dead. One Wadhawa Singh was seen trying to give Dula Singh some milk in order to revive him. He however left the place when Mt. Kishen Kaur re-entered the house naked. Narain Singh, the lambardar, came in and the whole story was related to him by Mt. Kishen Kaur; how the four accused had assailed Dula Singh and maltreated her.

On the return of Kehr Singh to the compound and the arrival of Sher Singh, another brother of Labh Singh, they started, in the company of Narain Singh, the lambardar, to report the matter at the Police Station, Paltoki. The report was made at 8-15 p. m., on the evening of 21st July 1918. It was made by Narain Singh alone as his two companions, Kehr Singh and Sher Singh, had left him in the way and had gone to look for Labh Singh in the village at Bhai Kot, having requested Narain Singh not to make any report until the arrival of Labh Singh. In the report it was stated that Narain Singh was sitting under a tahli tree that day near the village well. He suddenly heard the voice of Dula Singh uttering the words "mar gae, mar gae." Upon this he went to the house of Dula Singh and saw Bahal Singh and Mula Singh, sons of Mohkam Singh, Jat, residents of the village, coming out of the house of Dula Singh. Bahal Singh had a chhavi in his hand while Mula



Singh a dang. When he went inside the house, he saw Dula Singh lying murdered on the ground and blood oozing out of his head. Mt. Kishen Kaur said to him that Bahal Singh and Mula Singh after murdering the deceased had taken to their heels. He gave as the reason for the murder the trespass by Gurdit Singh into the house of Bahal Singh and Mula Singh with the object of committing adultery with Mt. Kisso, their sister, about which a complaint had been lodged in the Court of the Tahsildar of Chunian.

It is to be borne in mind that in this report only two names were mentioned, namely those of Bahal Singh and Mula Singh. When the police arrived at about midnight, Mt. Kishen Kaur stated that Dula Singh had been killed by the four accused persons. She however reserved her full statement till after the return of her husband, Labh Singh. Narain Singh the lambardar, who had made the report, was examined as a witness for the prosecution in this case. It appears from his statement that he tried to modify his previous statement contained in the first information report. He admitted having seen two men running away from the house of Labh Singh. He stated:

"I saw two men running away: one had a dang and the other had some weapon; it might have been a gandasa or a chhavi. Something was shining; it might have been the ferule of a stick. I went into the compound. I did not identify either of the two men. I found Dula Singh lying murdered and Mt. Kishen Kaur sitting beside him. She told me that he had been murdered by Bahal Singh and Mula Singh".

He admitted having gone to the thana and having reported that a murder had been committed, but in order to minimise what he had reported to the police he stated in his deposition:

"I do not know what the police wrote. I did not have the report read out to me. I got no copy of the report given to me".

In his cross-examination he stated that Bahal Singh accused had opposed him at the time of his appointment as a lambardar. The Sub-Inspector, Gobind Sahai, who had taken down the first information report made by Narain Singh, lambardar, in his deposition stated that he took down the statement made by Narain Singh, that he wrote exactly what he said and that he gave him a copy of the statement. He read out the statement to him and he had acknowledged it

to be correct. A receipt for the copy was taken from him. According to the evidence of the Sub Inspector, the brother Kehr Singh also came to report and he reported against the four accused. Having taken down the report, as we have mentioned above, the Sub-Inspector went to the house of Labh Singh and arrived there at about midnight. He prepared the statement of injuries, and sent the body for post mortem examination with Mahna Singh constable. Mt. Kishen Kaur was examined by him, but she refused to give a full statement till the arrival of her husband but she did give him the names of the four accused. On the arrival of her husband she did make a fuller statement and handed over to the Sub-Inspector her torn clothes, a dang and a padlock. Mt. Kishen Kaur in her statement before the Court of Session stated that about 3½ months ago in the afternoon Dula Singh was lying on a bed in the compound. She was also in the compound working at her spinning wheel a few paces distant from Dula Singh. Ranjita and her little daughters were playing about. The door of the compound was locked for fear of enemies. At that time Bahal Singh came into the compound followed by the other three accused. Bahal Singh first struck Dula Singh on the head. According to her statement the other three accused, namely Mula Singh, Fatteh Singh and Dhara Singh, also attacked Dula Singh and hit him. Fatteh Singh and Mula Singh had gandastas. They struck Dula Singh on the top of the head. Fatteh Singh and Mula Singh struck at exactly the same time and in the same place. Dula Singh fell to the ground. Then Dhara Singh struck Dula Singh on the stomach two or three times with a dang which he had in his hand. According to this witness three of the accused persons had delivered strokes on the head of the deceased before he fell to the ground.

According to the medical evidence however it would appear that there was only one incised wound, 5 inches by 2 inches, found on the head of the deceased and that death was stated to have been caused "by injury ante mortem, homicidal and with some sharp weapon." Ranjit Singh, son of Labh Singh, corroborated the statement made by his mother Mt. Kishen Kaur. Kehr Singh was also examined as a witness in this case. He



admittedly was absent from the compound of Labh Singh at the time of the occurrence but he tried to make out that he came back just in time to observe from a distance the four accused persons going to the house of Wadhawa Singh.

The evidence of this man has been altogether discarded by the learned Sessions Judge, and for very good reasons. Labh Singh also admittedly was not present on the day of the occurrence and his evidence was merely formal. The learned Sessions Judge, having taken into consideration the discrepancies to be found between the first information report and the statement of Mt. Kishen Kaur as to the number and identity of the accused persons, came to the conclusion that it was not fully established that Fatteh Singh and Dhara Singh were also among the assailants. Upon a review of the entire evidence he however came to the conclusion that the case against Bahal Singh and Mula Singh was established beyond any reasonable doubt. He found that Mula Singh admitted that he went into the compound of Labh Singh and had a fight with Dula Singh in the course of which he killed the latter. As regards Bahal Singh the learned Session Judge found that as against him also the case had been fully made out upon the evidence of Mt. Kishen Kaur and Ranjit Singh. He preferred to rely upon the original statement of Narain Singh the Lambardar, and held that Bahal Singh's presence was established. The plea of alibi set up on behalf of Bahal Singh was rejected by the learned Judge for very good reasons.

The defence set up by Mula Singh was that he had struck Dula Singh in self-defence in retaliation of an attack made by Dula Singh upon him. His story was that he was watering his horse when it got loose, ran away and entered the house of Labh Singh attracted by the neighing of the colt in Labh Singh's compound. He followed the horse into the house and Dula Singh at once sprang upon him and hit him on the head with a dang. There was a kahi lying by which he picked up and used it in self-defence when he was being attacked by Dula Singh. The two witnesses called in support of this defence were disbelieved by the learned Sessions Judge for very cogent reasons. Having found that both Bahal Singh and Mula Singh had entered the house the learned Sessions Judge then considered the ques-

tion as to who actually delivered the fatal blow which brought about the death of Dula Singh. In his opinion it was established that several men of whom Bahal Singh and Mula Singh were two, had invaded the compound of Labh Singh armed with gandas and that they had immediately assaulted Dula Singh and that one of their number struck him on the head and killed him. He also held that it was proved that the common intention of the assailants was to kill some members of this family. He preferred to believe the theory that the party of assailants had come with the intention of killing some in Labh Singh's family. Taking this view of the case the learned Session Judge applied S. 34 read with S. 33, I. P. C., and held that all were guilty of the murder of Dula Singh. He therefore convicted both Bahal Singh and Mula Singh under S. 302 read with S. 34 I. P. C., and sentenced both of them to death.

It has been contended on behalf of the appellants that the case has not been made out against them upon the evidence on the record. On behalf of Bahal Singh it was urged that there was no reliable evidence to establish that he was one of the assailant. Now there can be no doubt that Bahal Singh and Mula Singh were named from the very commencement. Their names were mentioned in the first information report. Mt. Kishen Kaur and Ranjit Singh both named them and although Narain Singh the Lambardar tried to minimise the first statement, he did state that Mt. Kishen Kaur had told him that Dula Singh had been murdered by Bahal Singh and Mula Singh. We therefore entirely agree with the learned Sessions Judge in the conclusion that the presence of both the appellants has been established beyond any possible doubt. As regards the motive of the accused and the intention with which they came to the house of Labh Singh we have come to a different conclusion from that arrived at by the learned Sessions Judge. The real grievance which Bahal Singh's family members had against the family of Labh Singh was that Gurdit Singh had disgraced their family by having sexual intercourse with Mt. Kisso. It was as to this that they had complained to the Court. We think that their object in going to the house of Labh Singh was to



bring about by retaliation the same kind of disgrace upon Labh Singh's family to which their family had been subjected. In our opinion they intended simply to insult and disgrace Mt. Kishen Kaur, the wife of Labh Singh. No doubt they went there armed, as they thought it prudent to guard against possible opposition and danger. We do not think that we would be justified in holding under these circumstances that they had the intention of killing anybody. In all probability while attempting to molest Mt. Kishen Kaur they were opposed by Dula Singh and thereupon Mula Singh struck him with the weapon which he had which cut the parietal bone and caused the death.

As regards Mula Singh there can be no doubt upon his admission that it was he who delivered the fatal stroke. He must be taken to have intended to kill the man as he must have known the consequences of the use of the dangerous weapon with which he delivered the stroke (S. 300, Cl. 3, I. P. C.). He is therefore certainly guilty of the offence of murder. His story about the horse and subsequent fight with Dula Singh and his plea of self-defence cannot be entertained. The story on the face of it appears to be absurd. As has been shown, there is evidence, which we believe, to the effect that the door of the compound was closed and locked. It was not therefore possible for the horse or Mula Singh to have entered the compound through the door. The story of the horse having been proved to be false, the plea of self-defence based upon it must necessarily fail. As regards Bahal Singh, although we believe the evidence with regard to his presence, we do not think that he can be found guilty of the offence of murder. The act which caused the death of Dula Singh has not been established against him. According to the medical evidence there can be no doubt that only one stroke was delivered and that stroke has been found to have been delivered by Mula Singh. It therefore follows that the Criminal Act was not done by Bahal Singh and Mula Singh jointly in furtherance of their common intention. Section 34, I. P. C., runs thus:

"When a criminal act is done by several persons (in furtherance of the common intention of all), each of such persons is liable for that act in the same manner as if it were done by him alone."

According to this section, in order to make both Bahal Singh and Mula Singh equally liable for the murder of Dula Singh it ought to have been established that both of them struck the deceased. It was so established in the two cases of the Allahabad High Court relied upon by the learned Public Prosecutor. In the case of *Queen Empress v. Mahabir Tiwari* (1) Strachey, C. J., made the following remarks:

"There can be no doubt however that the appellant was one of the persons committing the dacoity; and the evidence shows that, upon Gajraj seizing the appellant while the dacoits were engaged in plundering the threshing floor, all the dacoits attacked and beat him with lathis, and that the appellant similarly joined the rest in so beating him. It is thus clear that the attack on Gajraj was made by the dacoits, including the appellant, in furtherance of the common intention of all, and therefore each of them was liable under S. 34 of the Code in the same manner as if he were the sole assailant."

In the case of *Emperor v. Gulab* (2) the finding was that

"abuse followed between the parties and thereupon, according to the evidence for the prosecution, the three men attacked Hardial with their lathis. Ganga Prasad was also armed with a lathi and a regular fight took place between two men on one side and three on the other."

It was held in that case that

"the three accused were all armed with the same class of weapon. They all attacked Hardial . . . . . The three accused were moved by a common intention. That intention may not have been to cause death, but in carrying out their intention they all used deadly weapons and they must be deemed to have known that they were likely to cause death."

Upon this finding it was held in that case that S. 34 applied. Such is not the case here. In the case of *Emperor v. Nirmal Kanta Roy* (3), Stephen, J., at p. 1088 (of 41 Cal.) observed as follows:

"The second point depends on the terms of S. 34. This provides that when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone. In this case the killing of Nripendra was, according to the evidence done by one person who was not the accused. It was therefore not done by several persons and I do not see how the section can apply. The only act he can be liable for under the section is one done by several persons of whom he was one, i. e., by the man who escaped and himself. They may have committed many criminal acts together, but they did not both kill Nripendra. The difference between the acts of the two men is that the one actually killed

(1) [1899] 21 All. 263.

(2) [1918] 40 All. 686, = 47 I. C. 805.

(3) A. I. R. 1914 Cal. 901 = 24 I. C. 340 = 15 Cr. L. J. 460, = 41 Cal. 1072.



he Inspector, and the other accused merely attempted to kill him. In order to make the accused liable for murder, under S. 34, it would be necessary to say that an offence and an attempt to commit it are the same act which seems to me not to be the case."

We entirely agree in the view taken by Stephen, J., as to the applicability of S. 34. We are clearly of opinion that Bahal Singh has not been rightly convicted of the offence of murder under S. 302 read with S. 34, I. P. C. He however was a member of the invading party. They had both armed themselves, according to the evidence, with deadly weapons. It must have been known to Bahal Singh that in case of opposition the weapons would be used and at least it must have been known to him that in all probability grievous hurt would be caused. He must therefore be taken to have abetted an offence under S. 325 read with S. 109, I. P. C. Therefore, while upholding the conviction and confirming the sentence of death in the case of Mula Singh, we set aside the conviction and sentence passed upon Bahal Singh under S. 302/34 and we convict him under S. 325/109, I. P. C., and sentence him to seven years' rigorous imprisonment.

R.M./R.K. *Appeal partly accepted.*

### A. I. R. 1919 Lahore 380

SHADI LAL AND DUNDAS, JJ.

*Municipal Committee, Ludhiana—Defendants—Appellants.*

v.

*Ahad Shah—Plaintiff—Respondent.*

Second Appeal No. 2621 of 1915, Decided on 23rd May 1919, from decree of Dist. Judge, Ludhiana, D/- 28th May 1915.

Punjab Municipal Act (3 of 1911), S. 172—Permission granted should not be withdrawn—Construction of bridge with permission of Municipal Committee—Agreement to apply for fresh permission to maintain the bridge or permit its demolition after ten years—Failure to apply for fresh permission—Notice for demolition—Notice is ultra vires—Permanent injunction restraining Municipal Committee from demolition granted.

Section 172 does not contemplate that a permission once given by the Municipal Committee should be withdrawn after a term of years.

[P 381 C 1]

Plaintiff obtained permission from the Municipality of Ludhiana to build a bridge across a drain in front of his house, on executing an agreement to the effect that he would, at the end of ten years, either apply for fresh permission to maintain the bridge or permit its demolition. The ten years having elapsed and the plaintiff

not having applied for fresh permission, Municipality issued a notice under S. 172 calling upon the plaintiff to demolish his bridge or obtain fresh permission to maintain it. Thereupon the plaintiff instituted a suit for the issue of a perpetual injunction against the municipality restraining it from demolishing the bridge:

*Held:* (1) that the notice issued by the municipality was ultra vires; (2) that the circumstances did not fall within the purview of S. 172, and as the municipality was exceeding its statutory powers, it could be restrained by an injunction.

[P 381 C 1]

*Fazl-i-Husain*—for Appellant.

*Ghulam Rasul*—for Respondent.

**Judgment.**—The present case is a dispute between the Municipality of Ludhiana and the plaintiff Khwaja Ahad Shah. In the year 1903 Khwaja Ahad Shah applied for permission, to build a bridge across the drain in front of his house and obtained the permission upon his executing an agreement in favour of the Municipality of Ludhiana to the effect that he would at the end of ten years either apply for a fresh permission to maintain the bridge or permit its demolition. The ten years having elapsed and Khwaja Ahad Shah not having applied for any further permission, the Municipality issued a notice under S. 172, Punjab Municipal Act requiring Khwaja Ahad Shah either to demolish his bridge or to make a fresh application for permission to maintain it. Thereupon Khwaja Ahad Shah instituted a suit against the committee arguing the necessity of the bridge, denying his liability to execute any further agreement or to apply for any fresh permission, alleging that the condition attached to the grant of possession in 1903 was void and praying for an injunction re the Municipal Committee from demolishing the bridge or resorting to any other summary remedy available under the Act.

The vital question for determination is whether the Municipal Committee was entitled to resort to the summary remedy prescribed by S. 172, Punjab Municipal Act and could ask the plaintiff to remove the bridge after the expiry of ten years. The Courts below have answered this question in the negative, and for the reasons to be recorded hereafter we have no hesitation in concurring in that conclusion. The lower Courts have also expressed the opinion that the agreement entered into between the parties in 1903 is void and cannot be enforced. We consider that the action of the Municipal Com-



mittee, which prompted the suit, was the notice issued by it under S. 172, and that the discussion by the lower Courts as to the validity of the agreement has gone beyond what was necessary in order to grant the plaintiff an effective relief in the circumstances of the case. What has happened so far is that the committee has issued a notice under S. 172 requiring the plaintiff to demolish his bridge or to procure sanction for its maintenance. The first question that arises is whether the committee is entitled under the terms of the statute to issue this notice. The second and further question which the plaintiff has raised is whether the agreement executed by the plaintiff in 1903 can be entirely avoided by him, either as being expressly barred by the provisions of the Municipal Act or as being void or voidable under the Contract Act. Now, as to the first question we consider that there can be no doubt that the notice issued by the Municipal Committee under S. 172 of the Act is ultra vires. The circumstances disclosed are clearly not such as fall within the purview of the section. The material portion of the section runs as follows:

"Whoever, without the written permission of the committee, builds any immovable encroachment over any drain or water-course, shall be punishable with fine. The committee may, by notice, require the owner or occupier of any building to remove such immovable encroachment and no compensation shall be payable in respect of such removal."

But the plaintiff's bridge was built with the written permission of the committee and the Act does not apparently contemplate that such permission should be withdrawn after a term of years. At all events, the committee does not appear to be competent to issue a summary notice to the plaintiff under S. 172, as the plaintiff has not committed any act contemplated by that section. It follows that as the committee was exceeding its statutory powers, it can be restrained by an injunction and the plaintiff's claim to this extent must be allowed. But we do not consider that we are bound to go further than this. The question whether the Municipality has got any rights under the agreement executed by the plaintiff and can enforce its contract irrespective of the provisions of the Municipal Act can only be decided in a suit properly framed for that purpose and we must refrain from expressing any

opinion at this stage. The cause of action accruing to the plaintiff was the notice under S. 172, and the action of the municipality in this connection has been restrained. Should the committee think fit to endeavour to enforce the plaintiff's agreement by a regular suit, the further question will necessarily come up for decision. We accordingly modify the decree of the lower appellate Court and grant the plaintiff a permanent injunction restraining the defendant from demolishing the bridge by invoking the powers conferred by the Municipal Act. As the appellant has failed on the main question it must pay the costs incurred by the respondent.

R.M./R.K.

*Decree modified.*

### A. I. R. 1919 Lahore 381

WILBERFORCE, J.

*Gauri Shankar and others — Petitioners.*

v.

*Ganga Ram and others — Opposite Parties.*

Civil Revn. No. 624 of 1918, Decided on 7th January 1919, from order of Munsif, First Class, Hoshiarpur, D/- 25th June 1918.

(a) Civil P. C. (1908), Sch. 2, Para. 1—Suit referred to arbitration by consent of parties—One party not signing application but making oral application and taking part in arbitration—He is estopped from disputing award on ground that reference was not signed by him

Where one of the parties to a suit did not join in a written application for the case to be referred to arbitration but made an oral application accepting the arbitration, and took an active part in the proceedings:

*Held*: that he was estopped from objecting to the legality of the proceedings on the ground that he did not sign the application for reference to arbitration. [P 382 O 1]

(b) Civil P. C. (1908), S. 115—Interlocutory order not to be interfered in revision unless great injury is caused.

Ordinarily, an interlocutory order is not liable to be interfered with in revision: Where however great or irremediable injury might result, the High Court will interfere with such an order. [P 382 O 1]

*Fakir Chand*—for Petitioners.

*Umar Bakhsh*—for Opposite Parties.

**Judgment.**—In this case there are two plaintiffs and one defendant. A written application was made to the Court by one plaintiff and the defendant for the case to be referred to arbitration. On the following day the other plaintiff Ganga Ram, who had not joined in the written application, made an oral appli.



cation before the Court to to the effect that he accepted the arbitrator. The arbitration proceedings lasted for over a year and on behalf of the plaintiffs Ganga Ram conducted the proceedings throughout. An award was duly filed, but objected to by Ganga Ram on the ground that he had not signed the original application to the Court for an order of reference. The Court has held that this omission vitiated the whole of the proceedings and has set aside the award. Against this order the defendant has put in an application for revision. Even if it be admitted that the whole proceedings of the arbitrator were without jurisdiction on the ground that a mandatory provision of the law had not been complied with, I do not think that the lower Court should have set aside the award. The objecting plaintiff was clearly estopped, by his own actions in agreeing verbally in the Court to the arbitration and in taking an active part in the proceedings, from raising any objection as to the legality of these proceedings on account of the want of his application in writing, and the lower Court clearly committed a material irregularity in not giving effect to a provision of law contained in the Evidence Act.

It is objected that against an interlocutory order of this description no application for revision can lie, and I agree with this proposition in ordinary cases. There is no doubt however that this Court has a power of interference in the case of an interlocutory order, though such power is only exercised in cases where great or irremediable injury might result. In the present case the waste of time, money and trouble involved by the re-opening of the whole proceedings could never be repaired. Moreover there are other objections to the award which have not been decided by the Munsif and if it became necessary on some future occasion, after an appeal, to decide these objections, their correct decision might be rendered difficult owing to the lapse of time. I therefore consider that this is a fit case for the interference of this Court and accepting the application for revision I remand the case to the lower Court for decision of the remaining objections to the award.

R.M./R.K. *Application accepted.*

## A. I. R. 1919 Lahore 382

SCOTT-SMITH AND BROADWAY, JJ.

*Samand Singh and others—Appellants.*

v.

*Emperor—Opposite Party.*

Criminal Appeal No. 432 of 1918, Decided on 5th October 1918, from order of Sess. Judge, Amritsar, D/- 28th June 1918.

(a) Penal Code (1860), Ss. 302 and 304—Four persons attacking unarmed man, knocking him down and giving him merciless beating with sticks, resulting in death—Accused are guilty of murder.

Where four persons set upon an unarmed man, knocked him down and gave him a most merciless thrashing with sticks breaking his bones and ribs and causing the fracture of his skull, which resulted in his death:

*Held:* that the assailants must be considered to have committed these acts with the intention either of causing death or of causing such injuries as they knew to be likely to cause death and that therefore they were guilty of murder.

[P 385 C 1, 2]

(b) Criminal Trial — Evidence—Previous decisions seldom afford assistance in deciding nature of offence.

Previous decisions in criminal cases, proceeding as they do on their own set of facts seldom afford any very great assistance in deciding the nature of an offence.

[P 384 C 2]

*Nihal Chand Mehra—*for Appellants.

*C. Bevan Petman, Government Advocate—*for the Crown.

**Judgment.** — Samand Singh, Raja Singh, Bela Singh, sons of Kahn Singh, and Ganda Singh, son of Wadhawa Singh Jats of Jharu Nangal, have been convicted of having caused the death of Sundar Singh of the same village and under the second part of S. 304, Penal Code, have been sentenced to ten years' rigorous imprisonment including three months' solitary confinement and a fine of Rs. 100 each or in default to six months' further rigorous imprisonment. Against their convictions and sentences they have preferred two appeals, Ganda Singh having filed his appeal separately. The relatives of the deceased have also applied under S. 439, Criminal P. C., for an enhancement of the sentences. The story for the prosecution is that Samand Singh and his two brothers were on bad terms with Sundar Singh and his family owing to a dispute in connexion with the erection of a ghurial by Sundar Singh. This ghurial had been erected by Sundar Singh, a few months prior to the occurrence, in his haveli, which adjoined that of Samand Singh and his brothers. The lumby or chimney and the ghurri or waste outlet



had been so built as to open in the direction of the haveli belonging to Samand Singh, etc., who protested and apparently succeeded in compelling Sundar Singh not to use his ghurial. Each party apparently had minor quarrels over this from time to time which were patched up.

On 24th March 1918 Samand Singh was beaten by Sundar Singh's party and the matter was reported at the Jandiala Police Station by Raja Singh. The matter was however compromised and nothing further occurred till 15th May 1918, when Sundar Singh was killed. According to the prosecution, about noon on 15th May, Sundar Singh was sleeping in his house where Mt. Harkaur, his wife, was with him. P. W. 5, Mt. Lachhmi, came there and asked Sundar Singh to pay her Rs. 160 which was due as the sale price of some land purchased by Sundar Singh from her. Sundar Singh was unable to pay the money and somewhere about 2 p.m. he left his house with Mt. Lachhmi to see her on her way. In the lane, according to Mt. Lachhmi, they met Raja Singh and Bela Singh standing in their deohri and a little further on saw Samand Singh and Ganda Singh. All four had sticks and proceeded to attack the deceased. Mt. Lachhmi raised an alarm, which brought Mt. Harkaur, Wir Singh, the deceased's brother, Nawab Khan and Miraj Singh to the spot. It is said that in spite of their remonstrances the four appellants continued to belabour Sundar Singh, who had fallen to the ground, and then they picked him up and carried him into the kotha of Samand Singh and locked the door. The persons outside could hear the sound of blows being delivered inside the kotha. Mt. Harkaur went off to tell her son Santa Singh, and Wir Singh went to Rahmana Chak and there informed Ganga Singh, the father of the deceased, who returned with two lambardars and a chaukidar, who asked the accused to open the door. This they refused to do, saying that they had got their "thief" inside. Finally, Raja Singh, who was standing in the courtyard, produced the key and unlocked the door and slinging Sundar Singh over his shoulders took him to his Sundar Singh's house.

There he was found by his son Santa Singh, who states that his father, on being questioned by him, named the four appellants as his assailants. Ganga Singh

(P. W. 8) and Bishen Singh, the father and younger brother of the deceased, started for the police station to make a report. They were however followed and overtaken by Raja Singh who persuaded them to return, reminding them that when Samand Singh had been beaten a compromise had been effected. According to Ganga Singh, Raja Singh also assured him that Sundar Singh was better having taken nourishment. On his return to the village, Ganga Singh found that Sundar Singh was dead. Thereupon Santa Singh (P. W. 2), accompanied by his uncle Hakim Singh and (P. W. 14) Hakim Singh, *sufaidposh*, proceeded to the Jandiala Police Station, some eight miles distant, where he made his report at 3 a.m. on 16th May 1918. Raja Singh had met the reporting party some 150 karams from the police station and had again endeavoured to dissuade them from making a report. The police were informed of this fact and Raja Singh was looked for and brought to the police station where his pagri, kurta and chadar were taken from him as being bloodstained. The police reached Jharu Nangal at about 9 a.m. and found that the lambardars of Rahmana Chak had detained the other three appellants. Samand Singh was found to have a wound on the arm. This story is borne out by the prosecution witnesses, and the only discrepancy in their statements, that counsel has been able to point out, relates to the order of arrival on the scene of Mt. Harkaur and the other eyewitnesses. This we regard as immaterial and in no way detracting from the value of the evidence of these witnesses.

It was urged that all the witnesses were related to, or in some way connected with, the deceased, but this is not correct. Nawab Khan (P. W. 4) is a lambardar of Beriwalla, and there is nothing on the record to suggest that he is in any way biased in favour of the prosecution or inimical to the appellants. (P. W. 7) Miraj Singh is also only a connexion of the deceased by marriage, Sundar Singh's brother in law's son being the husband of the witness' sister-in-law; while Mt. Lachhmi (P. W. 5) is not related at all. The delay in making the report has, we consider, been satisfactorily accounted for. Counsel laid stress on the fact that Sohawa Das (P. W. 9), lambardar of Rahmana Chak,



is recorded as having stated that Ganga Singh told him that "his son was missing." The learned Government Advocate pointed out that this is contradicted by (P. W. 10) Budha of Rahmana Chak, and further contended that in any event the matter was immaterial and accounted for by the fact that Ganga Singh had been told that his son had been taken into Samand Singh's house and did not really know what had become of him. We are unable to regard this statement as in any way weakening or throwing doubt on the story for the prosecution, which is supported by independent evidence.

On behalf of Ganda Singh it was urged that he had nothing to do with the quarrel over the ghurial. It is however admitted that he was at enmity with Sunder Singh and his name was mentioned from the very beginning while the police found him under detention on their arrival. We have no doubt at all that all the four appellants were concerned in the attack on Sunder Singh and we hold accordingly. Two of the assessors were of opinion that all the appellants were guilty of murder under S. 302, I. P. C., while the third assessor considered that Samand Singh and Bela Singh were guilty under S. 302, I. P. C., and the other two appellants under S. 304, I. P. C. The learned Sessions Judge thought that the assessors were not in a position to form any opinion as to the nature of the offence committed, and holding that the second part of S. 304, I. P. C., was applicable sentenced the appellants as noted above. Counsel for the appellants contended that S. 325, I. P. C., was the appropriate section or at the utmost the second part of S. 304, I. P. C. It was urged that the immediate cause of the fight was not apparent and that the injury on Samand Singh strongly supported his account of what had occurred and excused, if it did not justify the beating given to Sunder Singh. This account is that on the day of the occurrence Samand Singh was leaving his house with his plough when in the lane he met Sunder Singh and his sons and Wir Singh and his son and Hakin Singh and his son, that Sunder Singh cried out "You escaped last time but you will not to-day," and struck him on the arm with a toka whereupon he fell down and knew no more. There is not a tittle of evidence to support this

story and we have no hesitation in rejecting it. The injury to Samand Singh might well have been inflicted by his relations in order to meet the serious charge they knew would be brought owing to Sunder Singh having succumbed to his injuries.

Our attention was drawn to *Gujan v. Queen Empress* (1), *Shib Das v. Crown* (2), *Dhani Ram v. Emperor* (3), *Lachman Singh v. Emperor* (4), *Chandan Singh v. Emperor* (5) and *Anandi v. Emperor* (6). Previous decisions in criminal cases, proceeding as they do on their own set of facts, seldom afford any very great assistance in deciding the nature of an offence. The facts in *Gujan v. Queen-Empress* (1) were quite different from those in the present case and the finding there was that the accused had no intention of killing or badly injuring the deceased. The same applies to *Shib Das v. Crown* (2). The facts in *Dhani Ram v. Queen-Empress* (3) have no similarity with those in the present case and no further discussion is needed; whereas *Lachman Singh v. Emperor* (4) has no bearing on the point before us. In *Chandan Singh v. Emperor* (5) three persons attacked a fourth with lathis and death resulted through fracture of the skull of the person so attacked. In the present case death was due to a merciless thrashing. In *Anandi v. Emperor* (6) death had been caused by the administration of arsenic and it was held that a person could only be held guilty when the Court was satisfied of the certainty of his guilt, a proposition with which we have no quarrel. In the present case the medical evidence shows that the deceased received a most merciless thrashing. There were lathi marks on each lower limb, smashing the right knee cap. There were also similar marks on each upper limb breaking both bones of each forearm and smashing the right elbow. There were several lathi marks on the back and the whole occipital area on the right temporal area of the skull was extensively smashed and driven into the brain, while four ribs of the rights side were broken,

(1) [1893] 18 P. R. 1893 Cr.

(2) [1908] 2 P. W. R. 1908 Cr.=7 Cr. L. J. 321.

(3) [1913] 14 Cr. L. J. 104=18 I. C. 664.

(4) [1911] 12 Cr. L. J. 6)=1 I. C. 400

(5) [1918] 40 All. 103=43 I. C. 438=19 Cr. L. J. 150.

(6) [1916] 17 Cr. L. J. 102=32 I. C. 833.



The learned Government Advocate who strongly supported the application for enhancement, drew our attention to *Nawab v. Emperor* (7), *Kanhai v. Emperor* (8), *Emperor v. Ram Newaz* (9) and *Elem Molla v. Emperor* (10). In the ruling of this Court (1) it was held that when two persons beat an unarmed man to a jelly and fractured 14 ribs, it was difficult to see how the assailants could have had any intention short of causing death or causing such bodily injury as they knew was likely to result in death. In *Kanhai v. Emperor* (8) the facts were very similar to those in the present case, four men attacking a fifth with lathis, and it was held that S. 302, I. P. C., was applicable. The same was the case in *Emperor v. Ram Newaz* (9). In *Elem Molla v. Emperor* (10) six persons attacked a man in a determined manner, inflicting 16 wounds on his body and causing several and severe ruptures of the spleen, and thus caused his death. It was held that such acts, committed by several persons on one, in such a manner apparently regardless of the consequences and with such results, warranted the inference that the acts were done by those persons with the intention either of causing the death of the person attacked or such injuries as the offenders knew to be likely to cause his death and that the offence therefore amounted to murder. With the principles enunciated in these rulings we are in complete accord and we consider that the facts in this case clearly bring the appellants within the purview of S. 302, I. P. C. The evidence on the record shows that Sundar Singh was unarmed and that he was set upon by the four appellants, who knocked him down and continued beating him unmercifully. Further after carrying him into the house of Samand Singh, appellant, they still further proceeded to beat him and we consider that they undoubtedly committed these acts with the intention either of causing death or of causing such injuries as they knew to be likely to cause death. Indeed the learned Sessions Judge himself finds that although

the offence committed by the appellants could not be regarded as a premeditated and deliberate act of murder,

"the accused could very well know from their act that they were causing such bodily injury as would result in the death of the man."

In the face of this finding it is difficult to understand how the learned Sessions Judge came to the conclusion that the second part of S. 304, I. P. C., applied. We hold that the appellants are guilty of murder under S. 302, I. P. C., and we alter the convictions to ones under that section and sentence each of the appellants to transportation for life. As it is not quite clear how this attack originated we refrain from passing the capital sentence.

R.M./R.K.

*Sentences enhanced.*

### A. I. R. 1919 Lahore 385

ABDUL RAOOF AND MARTINEAU, JJ.

*Harbans Lal*—Plaintiff—Appellant.

v.

*Atra and others*—Defendants—Respondents.

Second Appeal No. 2792 of 1915, Decided on 14th June 1919.

(a) Custom (Punjab)—Succession—Brahmins—Law governing is personal law—Special custom must be proved by cogent and clear evidence.

In a case of disputed succession or alienation on the ground of custom, the universal rule is that a Brahmin is presumed to be governed by his personal law, and if he alleges a custom contrary to the rules of that law, he is bound to prove by cogent and clear evidence that he is governed by such custom. [P 387 C 1]

The question of custom is, primarily, a question of fact and in each case has to be decided with reference to the particular circumstances alleged and proved. [P 386 C 2]

(b) Custom (Punjab)—Agricultural custom—Test of adopting same laid down.

The most important criteria for determining whether a particular community has adopted and follows agricultural custom are: (a) whether the particular community forms a compact agricultural community by itself; (b) whether their source of livelihood is solely or almost solely agricultural; (c) whether the members of the community have given up their old customs under the personal law and have adopted the customs of their agricultural neighbours in matters of alienation and succession. [P 387 C 2]

(c) Custom (Punjab)—Succession—Brahmins of Kungiana are governed by Hindu Law.

The Brahmins of Kungiana, Tahsil and District Ludhiana, are governed by Hindu law in matters of alienation and succession: 8 P. R. 1908, Dist. [P 387 C 2]

*Manohar Lal*—for Appellant.

*Mehr Chand Mahajan* for Jagan Nath—  
—for Respondents.

(7) A. I. R. 1914 Lah. 98=31 P. R. 1914 Cr.=25 I. C. 522=15 Cr. L. J. 610.

(8) [1918] 85 All. 329=21 I. C. 657=14 Cr. L. J. 609.

(9) [1918] 85 All. 506=21 I. C. 663=14 Cr. L. J. 615.

(10) [1910] 87 Cal. 815=6 I. C. 921=11 Cr. L. J. 417.



**Abdul Raoof, J** — (12th June 1919)—

The facts which have given rise to this second appeal may be stated as follows: Harbans, minor son of Krishna, Brahmin, the plaintiff in the case, and Chetu, Brahmin, defendant 1 are admittedly descended from a common ancestor. Kahna and Atra, defendants 2 and 3, are Jats and mortgagees of certain lands from defendant 1. Chetu held certain lands situated in a village called Kungiana which had descended to him from his ancestors. Out of this land he mortgaged 15 bighas 14 biswas  $1\frac{1}{2}$  biswansis to defendants 2 and 3 under a deed, dated 4th September 1913. The plaintiff, alleging himself to be a collateral of Chetu, having a reversionary right in the property, brought the present suit on the ground that Chetu, being a sonless proprietor, could not make a transfer so as to be binding on the plaintiff after his death. He prayed for a decree that the mortgage deed shall not be binding on him. It was further alleged by him that the land was ancestral and that Chetu had no necessity to borrow Rs. 2,600 and make the mortgage affecting the interest of the plaintiff. Chetu admitted the claim, which was contested by the other defendants on the following grounds, namely, that the father of the plaintiff having been adopted by Jhaban, he had ceased to be the reversionary heir of Chetu; that the plaintiff and the mortgagor, being Brahmins, were governed by the ordinary Hindu law and were not entitled to take advantage of the Customary law applicable to agriculturists; that Chetu, being a full proprietor, had unrestricted power of alienation; and that the mortgage had been executed for valid necessity and on payment of full consideration.

The ancestral character of the land was admitted and the fact of the plaintiff being the next reversioner was also admitted, but, as stated above, his right to institute the suit as the reversionary heir of Chetu was denied on the ground that his father had been adopted by Jhaban. The principal issue in the case was whether the plaintiff and Chetu were governed by agricultural custom and whether the plaintiff could maintain the suit. The other important issue was whether the mortgage had been made for necessity and consideration. These are the two issues with which we are concerned in this appeal. Almost all the other ques-

tions arising in the case are no more of any importance, nor were they raised or discussed before us at the hearing. The Court of first instance on the first issue came to the conclusion that the plaintiff and Chetu were governed by agricultural custom in matters of alienation and succession. On the question of necessity and consideration it held that necessity had been established to the extent of Rs. 1,100 out of Rs. 2,600 said to have been borrowed under the mortgage. It accordingly gave a declaratory decree in favour of the plaintiff to the effect that on the death of Chetu, the mortgage in favour of defendants 2 and 3 shall not be binding on the plaintiff except to the extent of Rs. 1,100, on payment of which he shall be entitled to get possession of the mortgaged land as the reversionary heir of Chetu.

From this decree Atra and the sons of Kahna, deceased, namely, Hira and Sardara, appealed to the lower appellate Court impleading the plaintiff and Chetu defendant, as respondents to the appeal. The lower appellate Court, having taken a different view from that of the first Court on the first issue, set aside the decree of that Court and held that plaintiff was not entitled to succeed and that his suit must be dismissed. On the other points raised before it the lower appellate Court generally agreed in the decision arrived at by the Court of first instance. His suit having been dismissed, the plaintiff has come up to this Court in second appeal and has filed the necessary certificate required by the Punjab Courts Act. Three pleas have been taken in the memorandum of appeal. The first which is the most important plea raises the question of custom and the remaining two pleas raise questions as to two items of consideration, namely, Rs. 500 out of Rs. 1,400 and Rs. 70.

On the question of custom elaborate arguments have been addressed to us on both sides and a large number of cases have been cited and discussed. The question of custom is primarily a question of fact and in each case has to be decided with reference to the particular circumstances alleged and proved. The authorities cited therefore can hardly be said to be an absolute guide for the decision of this particular case. No doubt certain guiding principles are laid down in the reported cases which will help us in



arriving at a conclusion in this case with reference to the facts admitted or proved. One principle appears to be clearly enunciated in almost all the reported cases, namely, that in a case of disputed succession or alienation on the ground of custom the universal rule is that a Brahmin is presumed to be governed by his personal law and if he alleges a custom contrary to the rules of that law, he is bound to prove by cogent and clear evidence that he is governed by that custom. Having this principle before our mind we have to see in this case whether the plaintiff has succeeded in establishing that Chetu and he are governed by the customary rule relating to alienations by agriculturists and they are no more subject to Brahmanic law in this respect. Close to the village Kungiana in which the land in dispute is situated there is a village called Rangian where, according to the plaint, Chetu and plaintiff reside. The history of the colony of Brahmins to which the plaintiff and Chetu belong appears to be this: a Brahmin, whose name is unknown came and settled in the village and took possession of a part of the area.

He was turned out by the Rajputs and the area remained uncultivated for a time. In Sambat 1869, when Maharaja Ranjit Singh became the ruler, the area was restored to one Harkishan Singh Brahmin with the help of the authorities and he was left in possession of three ploughs. It appears from the facts found that the descendants of Harkishan Singh have continued to cultivate this area, which has been known for some time as Brahmin Majra. On the evidence it is clear that some of the Brahmins have their houses in Mauza Rangian and live there while a few of them possess houses in Kungiana where their agricultural land is situated. The area of the land is almost 100 bighas. These being the circumstances under which the small Brahmin community has been living it is to be determined whether they have adopted and followed the agricultural customs of their agricultural neighbours, the Jats who own and cultivate almost the entire village Kungiana.

The learned Judges of the Chief Court, in deciding the numerous cases reported in the several volumes of the Punjab Record have tried to set out various criteria for the decision of questions of this kind and have applied them to the spe-

cial facts of those cases. The most important of those criteria are: (a) whether the particular community forms a compact agricultural community by itself; (b) whether their source of livelihood is solely or almost solely agriculture; (c) whether the members of the community had given up their old customs under the personal law and had adopted the customs of their agricultural neighbours in matters of alienation and succession. We refer only to some of the incidents, which are by no means exhaustive. Of course the most important piece of evidence in a case would be the evidence of actual instances showing the exercise of rights according to the recognised custom of agriculturists.

In this case however this class of evidence is wholly wanting. From the evidence it appears that the Brahmins have been in the habit of making transfers by way of sales and mortgages but no instance has been quoted in which a suit for setting aside an alienation was ever brought. There being no direct evidence of this kind we have to decide the quest on in dispute with regard to circumstantial evidence establishing one or more of the criteria set out in the several reported cases. One single circumstance has been very strongly relied upon on behalf of the plaintiff in this case, namely, that the Brahmins of Kungiana have been earning their livelihood through agriculture and their patti has been recognised as a separate patti under the name of Brahmin Majra. There is no doubt that in the jamahandi of the village the patti is described as above; but it has not been proved that they have their own lambar-dars. According to the evidence the community is very small and the area cultivated by it is insignificant. Necessarily therefore they have continued to supplement their income from Brahmanic dues known as birt received from their jajmans. They still wear the sacred thread called the jameo. In addition to this there is a statement made by the mother of plaintiff which goes to show that the father of the plaintiff was adopted by one Jhaban and in consequence of this adoption he did not get a share in his natural father's property. This is a very strong piece of evidence to show that the Brahmins have continued to be governed by their personal law (Dharam Shaster).



The Court of first instance relying upon the decision in *Nanak Chand v. Basheshar Nath* (1), decided the question in favour of the plaintiff. That was a very strong case the facts of which were entirely different from those of the present case. We find no similarity between the two cases. In that case a mass of documentary evidence was filed showing that the Brahmins of Gurdaspur had actually adopted the agricultural custom. The learned Judges who decided the case went into the evidence thoroughly and came to the conclusion that independently of the reported authorities there was clear evidence that the Brahmins in that case had adopted and acted upon the agricultural custom of the other agricultural communities. At p. 22 of the report we find the following passage:

"The facts and considerations set out above, when taken collectively, warrant the conclusion that Sarsut Brahmins of Gurdaspur must be treated as agriculturists, and that the onus which lies upon the plaintiffs of proving that in matters of inheritance they are governed not by Hindu law but by custom is under the circumstances of the case comparatively light. It now remains to be seen whether the onus has been discharged."

Having made this remark the learned Judges proceeded to deal seriatim with the documentary evidence in the case and refer to the entries in the *wajibularz* of the Mauza to the *riwajiam* of the *tahsil* prepared at the settlement to the statement of custom as embodied in the English Abstract of the Customary law of Gurdaspur and finally to the specific instances of exclusion of daughters and their sons by collaterals in matters of succession. This class of evidence unquestionably was very strong and the learned Judges came to the conclusion that the plaintiffs had succeeded in discharging the burden which lay upon them. The plaintiff in this case has not produced any such evidence in support of his case. This ruling therefore has no application to this case. A large number of rulings have been quoted and discussed in the judgment of the lower appellate Court and we do not think it necessary to go over the ground in our judgment. We will however refer to two of the cases cited by the learned counsel of the respondents, which in our opinion fully apply to the facts of this case. The facts of the case reported in

*Gangu v. Kanshi Ram* (2) are thus stated at p. 86 of P. R. 1911:

"It is not denied that the plaintiffs' family owns only 152 kanals of the total village area, 4,158 kanals; that they are entered in the settlement record as *malikan maqbuza*, having no share in the *shamilat*, and that they are not entirely dependent upon agriculture, but that they derive part of their income from the offerings made at a Gurdwara in the village which is in charge of the plaintiffs' family."

It was urged by the appellants' pleader in that case that the lands belonging to the Sodhi Khatri in the village were constituted into a separate patti known as Patti Sodhi, and that this showed that they formed a compact community of their own and must be presumed to have adopted the customs of the Sikh Jats among whom they had settled. The learned Judge who decided the case however held that the so-called Patti Sodhi consisted of the small area of 152 kanals only, and the mere fact of this patti being recorded separately in the settlement papers was insufficient to prove that the Sodhi Khatri had adopted agricultural custom with all its incidents. In this case also the Brahmins are *malikan-i-maqbuza*, have no share in the *shamilat*, and have another source of income for their livelihood. The mere fact that their patti known as Brahman Majra is recorded as a separate patti in the *jamabandi* cannot prove that the Brahmins have adopted the agricultural custom with all its incidents as to alienation and succession to the exclusion of their personal law. In the case reported as *Harnam Singh v. Hardevi* (3) at p. 156 of P. R. 1911 the learned Judge on the facts of the case made the following remark, which is fully applicable to the present case:

"Though these Sodhis have held land in the village for nearly 90 years, they did not come in with the founders; they are only *qubza maliks*, they number only five families, holding 100 acres of land out of a village area of 3,000 acres. Then there is no positive evidence one way or the other whether they live solely by agriculture; one imagine it would be difficult for five families to live on the profits of so small an area as that stated above."

These facts were very similar to facts established in this case and the learned Judge came to the conclusion that the plaintiffs in that case failed to establish that they had adopted the agricultural custom and had abandoned their own per-

(2) [1911] 28 P. R. 1911=9 I. C. 649.

(3) [1911] 43 P. R. 1911=10 I. C. 365.

(1) [1908] 3 P. R. 1903.



sonal laws. Taking the findings of the lower appellate Court and the above circumstances into our consideration we have also arrived at the same conclusion. We hold that the view taken by the lower appellate Court was a right view. In this view it is not necessary to decide the question of legal necessity and consideration, as to which both the Courts below have arrived at a concurrent finding, and this finding has not been seriously contested before us. We therefore dismiss the appeal with costs.

**Martineau, J.**—(14th June 1919).—I concur, and I may refer also to the following passage from *Tulsi Ram v. Nathu* (4) on p. 23 of *P. R.* 1917 of the report:

"The Brahmans in this village whose number is very small form but a small part of the village population, and it is not at all clear that they are members of the compact village community of the Hindu Jats, who are doubtless governed by customs. It is quite possible that these Brahman families have been influenced in matters of succession and alienation by the customs of their Jat neighbours, but even so it is for the plaintiffs to prove by satisfactory evidence to what extent they have been influenced in this direction."

Those remarks are applicable here. The plaintiff has to show how far the Brahmans of the village with which this case is concerned have adopted the customs of their agricultural neighbours. He has failed to show that they have adopted any of those customs, and I agree therefore with my learned brother that the appeal must fail.

R.M./R.K. *Appeal dismissed.*

(4) [1917] 5 *P. R.* 1917=39 *I. C.* 93.

### \* A. I. R. 1919 Lahore 389

SCOTT-SMITH AND MARTINEAU, JJ.

*Emperor*

*v.*

*Mt. Ruri*—Accused.

Criminal Appeal No. 464 of 1918, Decided on 4th November 1918, from order of Sess. Judge, Lyallpur, D - 10th May 1918.

(a) Husband and wife—Dissolution—Conversion—Penal Code, S. 494.

A Christian marriage is not dissolved by the apostasy of one of the parties. [P 390 C 2]

\* (b) Penal Code (1860), S. 494—Christian wife converting to Islam—Marriage is not dissolved—Subsequent marriage bigamous.

Where the accused a Christian wife, renounced Christianity and embraced Islam and then married a Mahomedan;

*Held:* that according to the Christian marriage law, which was the law applicable to the case, the first marriage was not dissolved and there-

fore the subsequent marriage was bigamous: 33 *Mad.* 371, and 3 *M. H. C. R. App.* 7, *Dist.*; 18 *Cal.* 264 and 49 *P. R.* 1907, *Foll.* [P 390 C 2]

\* (c) Criminal P. C. (1898), S. 198—Complaint under S. 494 written at suggestion of police—Provisions of S. 198 not contravened.

The fact that the complaint in respect of an offence under S. 494, I. P. C., is written at the suggestion of the police does not contravene the provisions of S. 198, Criminal P. C. [P 390 C 1]

(d) Criminal P. C. (1898), Ss. 204 and 215—Accused present—Notice under S. 204 is not necessary—Omission to issue notice does not render commitment to Sessions illegal.

Where on a case being called, the accused present themselves before the Magistrate, there is no necessity of issuing process to them under S. 204, and mere omission to issue process in such a case does not render the commitment of the accused to the Court of Session illegal.

[P 390 C 1]

(e) Criminal P. C. (1898), S. 215—Commitment.

A commitment once made can only be quashed by the High Court under S. 215. [P 390 C 1]

*Ram Lal*—for the Crown.

*Shuja-ud-din* for *Abdul Rashid*—for Respondent.

**Judgment.**—This is an appeal by the Local Government from an order of the Sessions Judge of Lyallpur acquitting *Mt. Ruri* of an offence under S. 494, I. P. C. The facts are not in dispute. *Mt. Ruri* was the wife of the complainant *Labhu*. They were Christians and were married according to the Christian rites. Some months ago *Mt. Ruri* left her aunt's house where she had been staying, became a Mahomedan, and married *Fazl Din*. She was found by *Labhu* at *Fazl Din's* house and taken to the thana at *Gojra*, where *Fazl Din* followed them. The police sent the parties to the thana at *Toba Tek Singh*, and from there to the Superintendent of Police at *Lyallpur*. *Labhu* had a complaint written at the suggestion of the Superintendent, who forwarded it with a slip to the District Magistrate, and the latter sent the case to *Mr. Phillips*, Honorary Magistrate, who after holding an inquiry committed *Mt. Ruri* and *Fazl Din* to the Sessions Court for trial. The learned Sessions Judge acquitted both the accused. The grounds on which he has acquitted *Mt. Ruri*, with whose case alone we are concerned are:

(1) that the provisions of S. 198, Criminal P. C., were not complied with, the machinery of law having been set in motion, not by *Labhu*, but by the police, who treated the case as though it were a cognizable one the accused persons having been practically under custody from



the time when they were taken to Toba Tek Singh, (2) that the Magistrate did not follow the procedure laid down in Ss. 200 and 204 of the Code, and (3) that according to the Mahomedan law Mt. Ruri's marriage to Labhu was dissolved by her conversion to Islam, and she was therefore not guilty of bigamy in marrying Fazl Din. With regard to the first point, we think it is clear that the Magistrate took cognizance of the case on the complaint of Labhu. The fact that it was at the suggestion of the police that Labhu had the complaint written is immaterial. We hold that there has been no contravention of the provisions of S. 198, Criminal P. C. As to the second point, the learned Sessions Judge is mistaken in thinking that the Committing Magistrate started the inquiry without examining the complainant. The record shows on the contrary that the first thing the Magistrate did when the case came before him was to take the statement of the complainant. As to the issuing of process to the accused under S. 204 this was unnecessary as the accused were already present when the case came before the Magistrate. The procedure followed by the Magistrate was perfectly regular, and we may note that even if there had been such an irregularity as the learned Sessions Judge thinks there was in the magisterial inquiry, this would not have vitiated the trial in the Sessions Court. The commitment to that Court held good under S. 215 of the Code could not have been quashed except by this Court.

As regards the third point the lower Court has erred in applying the Mahomedan law to the case. As Labhu and his wife were Christians and were married according to Christian rites, the law applicable is obviously the Christian marriage law, under which a marriage is indissoluble except by death or divorce. Counsel for the respondent relies on *Emperor v. Antony* (1) and *Madras High Court Proceedings*, 8th November 1866 (2) but those were cases of a Hindu convert to Christianity marrying a Christian woman and then relapsing into Hinduism and marrying a Hindu woman, and the ratio decidendi was that a convert from Hinduism re-acquires his right to be a polygamist on ceasing to be a Christian and becoming a Hindu again. Those

rulings are not in point in the present case, which is one of a Christian woman (not alleged to be a convert) becoming a Mahomedan. The law not allowing a plurality of husbands, the respondent's second marriage, having been contracted while her first marriage subsisted, was invalid.

In *Ram Kumari*, *In the matter of* (3) and *Jamna Devi v. Mul Raj* (4) it has been held that a marriage between Hindus is not dissolved by one of the parties thereto embracing Islam, the matrimonial bond being regarded by the Hindu Law as indissoluble. Those authorities are applicable here, the principle being the same where the parties to the first marriage were Christians. Neither in the case of Christians nor in the case of Hindus is the marriage dissolved by the apostasy of one of the parties. Mt. Ruri cannot by renouncing the Christian religion cast off the obligations which she contracted at the time of her marriage to Labhu. We hold therefore that Mt. Ruri's marriage to Labhu was not dissolved by her becoming a Mahomedan, and that by marrying Fazl Din she committed an offence under S. 494, I. P. C. We accept the appeal and convict Mt. Ruri of an offence under that section, and sentence her to three months' simple imprisonment.

R.M./R.K.

*Appeal accepted.*

(2) [1866-67] 3 M. H. C. R. App. 7=1 Weir, 561.

(3) [1891] 18 Cal. 264.

(4) [1907] 49 P. R. 1907.

### A. I. R. 1919 Lahore 390

BROADWAY, J.

*Jamna and others*—Defendants—Appellants.

v.

*Sarjit and others*—Plaintiffs—Respondents.

Second Appeal No. 3253 of 1917, Decided on 25th October 1918, from decree of Dist. Judge, Delhi, D/- 27th August 1917.

Civil P. C (1908), O. 22, R. 3—Joint decree—Death of one respondent—Failure to bring legal representatives of deceased on record—Appeal abated in its entirety.

Certain proprietors of a village obtained a decree declaratory of the right of all the proprietors to obtain a share in certain land. A second appeal was filed in the Chief Court, and it appeared that, before the filing of the appeal, one of the proprietor-decree-holders had died, but owing to the default of the appellants, no notice of the appeal was served on his representatives. It was contended that the appeal had

(1) [1910] 33 Mad. 371=8 I. C. 572.



abated in its entirety, while for the appellant it was urged that the appeal had abated only with respect to the share of deceased decree-holder:

*Held:* that the appeal had abated in its entirety, inasmuch as even if it were accepted, the decree which was in favour of the proprietors jointly could not stand against only one of them. [P 991 C 2]

*Kharak Singh*—for Appellant.

*Manohar Lal*—for Respondents.

**Judgment.**—The facts of this case, so far as it is necessary to detail them for the purposes of this appeal, are as follows: In the village of Dhakla there is a Pana known as Pana Ugam in which there are four Thullas, namely, Thullas Mughlan, Mudhawan, Raghawan and Bhagwan. The land in suit, measuring about 8½ bighas pukhta, was claimed by the proprietors of Thullas Mughlan and Madhawan as belonging to the proprietors of Pana Ugam, whereas the proprietors of Thullas Raghawan and Bhagwan claimed that they alone were entitled to any interest in the said land. The proprietors of the Thullas Mughlan and Madhawan instituted a suit against the proprietors of the other two Thullas asking for a declaration that all the proprietors in Pana Ugam were entitled to a share in this land. The trial Court granted the plaintiffs a decree as prayed, and an appeal by the defendants was rejected by the learned District Judge. The defendants, who are the proprietors in Thullas Raghawan and Bhagwan, then preferred this second appeal through Sardar Kharak Singh which was admitted by me on 4th January 1918. On 10th June 1918 Sardar Kharak Singh filed an application under O. 22, R. 4, Civil P. C., in which he alleged that one Sheo Narain, one of the respondents, had died some five months previously and asked for his sons to be brought on to the record as his representatives in the appeal. The application was granted subject to all just exceptions and the case came up before me on 30th July 1918, on which date it was discovered that notice to the sons of Sheo Narain had not issued owing to the fact that neither Sardar Kharak Singh nor his client had filed any process-fee. An adjournment was granted, but in my order adjourning the case I noted that Mr. Manohar Lal for the respondents stated that he had been informed that Sheo Narain had died some eight months before the application was made.

Mr. Manohar Lal has today filed before

me a certified copy of the death certificate of Sheo Narain, the correctness of which has not been challenged by Sardar Kharak Singh. According to this, Sheo Narain died on 20th October 1917, and his death was duly reported on the 23th of the same month. It will thus be seen that Sheo Narain had died before this second appeal was filed in this Court. On behalf of the respondents Mr. Manohar Lal contended that the appeal abated in its entirety. Sardar Kharak Singh referred me to *Gulsher Khan v. Moshuk Ali Khan* (1) and *Piyare Lal v. Chura Mani* (2) and contended that the appeal had not abated at all or that if it had abated, it had abated only as against Sheo Narain and his representatives. Neither of the cases cited by the learned counsel afford him any assistance. It is obvious that the decree, so far as Sheo Narain's representatives were concerned, must stand. That decree is to the effect that the proprietors of the whole Pana Ugam are entitled to the land in suit and not only the proprietors of the defendants appellants' Thullas. In these circumstances even if the appeal were accepted the decree, so far as Sheo Narain's sons are concerned, could not be set aside, and therefore I hold that the appeal has abated in its entirety. Mr. Kharak Singh then contended that his clients did not know of the death of Sheo Narain. It has been held more than once that ignorance of the death of a respondent or a party is no excuse. As to this see *Sayad Mir Nawab v. Hardeo* (3) cited by Mr. Manohar Lal and *Hadu v. Lala* (4). I therefore dismiss this appeal with costs.

R.M./R.K.

*Appeal dismissed.*

(1) A. I. R. 1914 All. 113=22 I. O. 929.

(2) [1918] 84 P. R. 1919=16 I. O. 50.

(3) [1911] 60 P. R. 1911=12 I. O. 871.

(4) A. I. R. 1914 Lah. 123=21 I. O. 951=41 P. R. 1915.

### A. I. R. 1919 Lahore 391

LEROSSIGNOL AND MARTINEAU, JJ.

*Mt. Rahmun and others*—Defendants—Appellants.

v.

*Mt. Husain Bi and others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 2933 of 1914, Decided on 9th December 1918, from decree of Dist. Judge, Rawalpindi, D/- 21st October 1914.

Guardians and Wards Act (8 of 1890), Ss. 29, 30 and 31—Sale by guardian with



permission of Court—Want of necessity does not invalidate sale, unless Court's permission is obtained by fraud.

A sale, with the permission of the Court, effected by a duly certificated guardian of the property of his ward, cannot be impeached by the ward on the ground that there was no necessity for it, and, unless the Court's permission was obtained by fraud, such a sale transfers a good title to the vendee. [P 392 C 1]

*Govind Das and Parduman Das*—for Appellants.

*Nand Lal*—for Respondents.

**Judgment.**—The plaintiff Husain Bi has sued for her share, by the Mahomedan law, in two houses and some land left by her father Karam Bakhsh. The first Court gave her a decree, which the learned District Judge has upheld. A second appeal has been preferred to this Court by three of the defendants in regard only to one house, which has been designated as house A.

This house was sold on 19th August 1901, after the deaths of Karam Bakhsh and his son Alla Bakhsh, by the latter's widow, Ghulam Bi defendant 1, who had on 21st July 1900 been appointed by the District Judge to be guardian of the persons and property both of her own sons and of the plaintiff and Nur Jan, who were Allah Bakhsh's half-sisters. The sale was effected for Rs. 1,000 in favour of defendant 5, who sold the house on 6th September 1901, to defendant 6 and the father of defendants 7 and 8, and defendant 6 sold his share in 1909 to defendants 9, 10 and 11. The appellants in this Court are defendants 8, 9 and 11. The plaintiff contests the validity of the sale effected by her guardian Ghulam Bi in 1901, on the ground that there was no necessity for it. Ghulam Bi had obtained the permission of the District Judge to sell the house on 9th February 1901, and the first Court found that she had the benefit of the minors in view, but instead of dismissing the suit in regard to this house it passed a decree for the whole of the property claimed without giving any reasons for so doing.

The lower appellate Court finds that the District Judge's permission for the sale was given in consequence of misrepresentation on the part of Ghulam Bi. In her application of 19th February 1900 for being appointed guardian of the minors, Ghulam Bi described the plaintiff and Nur Jan as the daughters of Allah Bakhsh (her husband) and in the order appointing her as guardian the District

Judge spoke of her as being the mother of the minors, and said that no one could be a better guardian than the mother. The lower appellate Court concludes that the District Judge was misled by Ghulam Bi wrongly representing herself to be the mother of the minors Husain Bi and Nur Jan, and that if he had not been misled he would not have appointed her to be their guardian. The Court has therefore held that the order appointing her as guardian and the order sanctioning the sale of the house were obtained by misrepresentation, and that there was thus no valid permission for the sale. On this ground it has maintained the first Court's decree.

The lower appellate Court has however overlooked an important document on the file of the guardianship case, namely, an application, dated 29th April 1900, which Ghulam Bi put in on 9th June 1900, in which she asked that she might be appointed guardian of her sons and of her husband's sisters. This shows that she can have had no intention of deceiving the Court. Although it has not been explained why she described Husain Bi and Nur Jan in her first application as the daughters of Allah Bakhsh, and not as her sisters-in-law, it is very probable that the reason was that they had been living with her and Allah Bakhsh and had been treated by them as though they were their own daughters. It is at any rate clear from the application which she made on 9th June 1900 that no fraud was committed by her. The District Judge had also before him, when he appointed Ghulam Bi to be the guardian of the minors, the written statement of the collaterals of Karam Bakhsh in which they referred to Husain Bi and Nur Jan as Karam Bakhsh's daughters.

Even if what was said by Ghulam Bi in her second application and by the collaterals in their written statement escaped the notice of the District Judge in 1900, and he was misled by Ghulam Bi's first application and thought that Husain Bi and her sister were Ghulam Bi's daughters, this would not affect the validity of the appointment of Ghulam Bi as guardian. It is to be observed that Karam Bakhsh's collaterals had not discriminated between Ghulam Bi's children and the children of Karam Bakhsh, but objected to Ghulam Bi being appointed guardian of the property of any of them, and



it is doubtful whether if the Judge had known that Husain Bi and Nur Jan were not Ghulam Bi's daughters but her sisters in-law, he would have passed a different order. But in any case the appointment of Ghulam Bi as guardian would hold good, as S. 48, Act 8 of 1890 provides that an order made under the Act shall be final (subject to any order that may be passed by the High Court in appeal or revision) and shall not be liable to be contested by suit or otherwise.

Further, the order of 9th February 1901, by which Ghulam Bi was given permission to sell the house, was not the result of any fraud, and was a valid order. It was held in *Jadu Nath Acharjya v. Tarak Chandra* (1) that a sale by a certificated guardian of the property of his ward with the permission of the Court transfers a good title to the vendee unless the Court's permission was obtained by fraud, and a similar view was taken in *Sikher Chund v. Dulputty Singh* (2) and by the Privy Council in *Gangapershad Sahu v. Maharani Bibi* (3). The case of the appellants is all the stronger as they are not the original purchasers from the guardian. Following the authorities mentioned above, we hold that the plaintiff cannot impeach the sale which was effected by her guardian with the permission of the Court, and that the claim for a share in house A therefore fails. We accept the appeal and modify the decree so far as to dismiss the claim for a share in house A, the decree for the rest of the property in suit being maintained. The plaintiff will pay the appellants' costs throughout.

R.M./R.K.

*Appeal accepted.*

(1) A. I. R. 1914 Cal. 319=25 I. C. 810.

(2) [1880] 5 Cal. 869.

(3) [1885] 11 Cal. 379 = 12 I. A. 47 = 4 Sar. 621 (P.O.).

**A. I. R. 1919 Lahore 393**

SCOTT-SMITH AND MARTINEAU, JJ.

*Lachhman Das*—Defendant—Appellant.

v.

*Kharak Singh and others*—Plaintiffs and Defendants—Respondants.

Second Appeal No. 391 of 1916, Decided on 6th August 1918, from decree of Dist. Judge, Gujranwala, D/- 10th January 1916.

Specific Relief Act (1 of 1877), S. 22—Delay in bringing suit disentitles one to use of discretion under S. 22.

Where a person allows a period of more than three years to elapse from the failure of the defendant to complete a contract of sale before bringing a suit for specific performance of the contract, the inordinate delay, apart from any other act of the plaintiff which would amount to a waiver of his right to sue for specific performance, is sufficient to disentitle him to any relief, and the case is not one in which the discretion given by S. 22 should be exercised in favour of the plaintiff.

[P 395 C 1]

*Mul Chand and Ram Bhaj Datta*—for Appellant.

*Sheo Narain and Sewa Ram Singh*—for Respondents.

**Judgment.**—In the case out of which the present appeal arises plaintiffs Kharak Singh and others, respondents, sued Khushal Chand and others, vendors, and Lachhman Das, vendee, for specific performance of the contract to sell a certain land to them for a sum of Rs. 4,100. The lower appellate Court having reversed the order of the first Court and having decreed the claim, Lachhman Das has filed a second appeal in this Court and there is a cross-appeal by the plaintiffs for reduction of the price to be paid by them. The facts are clearly given in the judgment of the lower Court and briefly are as follows: Upon an application made to the Deputy Commissioner sanction was given by him on 11th August 1911, in accordance with S. 3, Punjab Alienation of Land Act, for sale of the land in dispute to the plaintiffs for a sum of Rs. 4,100. Subsequently a second application was made to the Deputy Commissioner to sanction the sale in favour of Lachhman Das, who was offering Rs 5,000, i. e. Rs. 900 more than the plaintiffs. On 15th September 1911 the Deputy Commissioner, in spite of the protest of the plaintiffs' agent who was present, gave sanction for the sale in favour of Lachhman Das in lieu of Rs. 5,000. He did not, however, pass any order cancelling the previous sanction to the sale in favour of the plaintiffs. On 30th October 1911 the sale was duly effected in favour of Lachhman Das and out of the consideration a sum of Rs. 331 was admittedly paid to Kharak Singh in liquidation of a simple money debt owed to him by the vendors. It is admitted that the plaintiffs financed a suit for pre-emption of the land by one Dit with the intention of getting the land from him if



he succeeded in his claim. Dit's claim, however, was dismissed.

It is also admitted that plaintiffs financed the suit of Munshi, son of Hira, vendor, for a declaration that the sale should not affect his reversionary rights. This suit has also been dismissed and a second appeal from the order is pending in this Court—Civil Appeal No. 1612 of 1914. The first Court, while finding other issues in favour of the plaintiffs, dismissed their suit on the ground that the sanction given by the Deputy Commissioner to the sale in favour of Lachhman Das cancelled the sanction previously given by that officer to the sale in favour of the plaintiffs. The lower appellate Court on the other hand held that the original sanction was still in force and had not been cancelled, and further that plaintiffs were not estopped from bringing the present suit and that there was no reason why specific performance should not be decreed in their favour and it, therefore decreed the plaintiffs' claim. The first point urged by Mr. Mul Chand on behalf of Lachhman Das, appellant, was that the original sanction dated 11th August 1911 had been impliedly cancelled by the grant of sanction for the sale in favour of his client on 15th September 1911. We agree with Mr. Mul Chand that if the Deputy Commissioner had cancelled the sanction it would not have been open to us to question the correctness of his order, but we are quite clear that he did not cancel the sanction and that that sanction remained in force even after 15th September 1911, when the proposed sale in favour of Lachhman Das was sanctioned.

The next point urged was that the plaintiffs were estopped by their conduct in receiving payment of their debt of Rs. 331 from Lachhman Das on 27th February 1912. Now it is in evidence that Kharak Singh at the time of receiving the money told Lachhman Das that he intended to bring civil and criminal suits against him. We do not see how he could very well refuse to accept payment of his debt. The money had been left by the vendors with the vendee for payment to him and if he had refused to receive the money from him, the latter could very easily have returned it to the vendor who could then have offered the money and Kharak Singh could not have refused to accept the payment. It is, however,

urged that the long delay on the part of the plaintiffs in bringing the present suit, which was instituted nearly three years after the sale to Lachhman Das, shows that they acquiesced and waived their right to bring a suit for specific performance. It is also urged that in any case such delay disentitles the plaintiffs from claiming specific performance of their contract. *Nawab Begam v. Creet* (1) is referred to by Mr. Mul Chand, in which it was held that great delay on the part of the plaintiff in applying to the Court for specific performance of a contract of which he claims the benefit is of itself a sufficient reason for the Court in the exercise of its discretion to refuse relief. In *Peer Mahomed v. Mahomed E'rahim* (2) a dictum of the Privy Council upon the doctrine of laches in Courts of equity cited with approval in the case of *Erlanger v. New Sombrero Phosphate Company* (3) is referred to, in which Lord Penzance observes:

"That delay has two aspects, it may lead to a change in the thing sold or it may imply acquiescence so as to bar a plaintiff's right—and it is essential 'to keep these two aspects of it separate and distinct when the consequences of delay come to be considered in connexion with the circumstances of an individual case'."

The point then in the present case is whether the delay on the part of the plaintiff in bringing the present suit justifies an inference of acquiescence or consent to the sale already effected in favour of Lachhman Das. Mr. Sheo Narain on behalf of the respondents says that they have satisfactorily explained the delay in suing. Their explanation is that they did not know that they could legally enforce an oral contract to sell and that it was only when advised by a pleader that they could enforce it that they brought the present suit. In our opinion this explanation is not a satisfactory one. The plaintiffs may indeed have thought that they could not enforce the agreement to sell to them, in view of the fact that the Deputy Commissioner had subsequently sanctioned the proposed sale in favour of Lachhman Das, but whatever they actually did think they must be presumed to have known the law. At any rate they could easily have found it out by taking legal advice. The facts that they accepted payment of their debt four

(1) [1905] 27 All 678.

(2) [1905] 29 Bom. 234.

(3) [1878] 3 A. C. 1218.



months after the sale to Lachhman Das, that they previously financed two other suits against Lachhman Das with the object of getting the land from him or of causing him trouble, and that it was only after this and nearly three years after the original sale that they brought the present suit, warrant in our opinion the inference that they waived their claim to sue for specific performance. If they did not and merely delayed to bring the present suit from some other motives, then we are of opinion that such an inordinate delay is sufficient to disentitle them to the relief claimed. After all the jurisdiction to decree specific performance is under S. 22, Specific Relief Act, discretionary, and we do not think that this is a case in which the discretion of the Court should be exercised in favour of the plaintiffs.

We therefore accept the appeal of Lachhman Das, and setting aside the order of the lower appellate Court dismiss the plaintiffs' suit but under all the circumstances of the case we leave the parties to bear their own costs in all the Courts. The plaintiffs' cross appeal is also dismissed, the costs being on the parties.

R.M./R.K.

*Appeal accepted.*

### \* A. I. R. 1919 Lahore 395

SCOTT SMITH AND MARTINEAU, JJ.

*Rajada and another—Plaintiffs—Appellants.*

v.

*Ghulla and others—Defendants—Respondents.*

Second Appeal No. 2926 of 1914, Decided on 6th August 1918, from decree of Addl. Judge, Lahore, D/- 31st August 1914.

\* Civil P. C. (1908), O. 23, R. 1—Suit on behalf of minor—Withdrawal of, when permissible explained—Court should guard minor's interests—Minor.

Courts should be very jealous of the interests of minors and should not allow a suit or part of a suit instituted on a minor's behalf to be withdrawn without being satisfied that it is for his benefit.

Plaintiffs sued for a declaration that the sale of certain land will not affect their reversionary rights. The plaintiffs had in their minority sued along with certain others for the same relief asking in the alternative for pre-emption of the land sold; subsequently there had been an amendment of the plaint by which the other plaintiffs alone claimed pre-emption, it being stated that the minor plaintiffs had no money with which to pre-empt. Later on an application was presented by all the plaintiffs for permission to withdraw the prayer for declaration. The

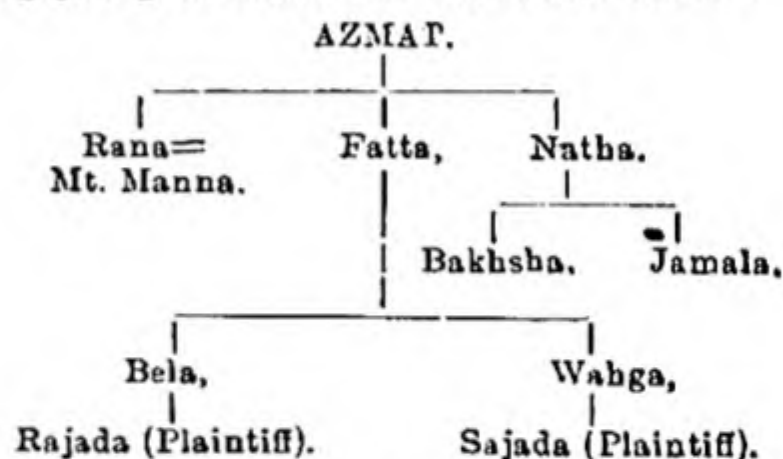
Court did not give its permission, nor did it consider whether the withdrawal was for the benefit of the minors. The case proceeded and eventually a decree for pre-emption was passed in favour of the adult plaintiffs, but by mistake the names of all were entered in the decree:

*Held:* that inasmuch as no reason was given by the next friend for withdrawing the suit on behalf of the minors, nor was the Court asked to allow the plaintiff to withdraw from part of the suit with liberty to institute a fresh suit in respect of the subject-matter of such part, nor was the interest of the minors considered; the minors were entitled to bring a separate suit for the relief which was abandoned in the previous suit. [P 396 C 2]

*Durga Das*—for Appellants.

*Mathra Das*—for Respondents.

**Judgment.**—In order to understand the facts of the present case the following pedigree table will be found useful:



On 2nd June 1908 Mt. Manna, Bela and Wahga sold 800 kanals of land to Ghulla, defendant-respondent, for Rs. 6,000. On 25th May 1909 a suit was brought by Bakhsha and Jamala, adults, and Rajada and Sajada, minors, through Bakhsha, their next friend, for a declaration that the sale would not affect their reversionary rights; and in the alternative they asked for pre-emption of the land sold. In November 1909 there was an amendment of the plaint by which Bakhsha and Jamala alone claimed pre-emption, it being stated that the minor plaintiffs had no money with which they could pre-empt. Subsequently on 20th March 1911, an application was presented by the plaintiffs for permission to withdraw the prayer for declaration. No reason however was given for this application. It came up before the Court on 6th May 1911; but as the plaintiffs were not present in person, the hearing was adjourned until 8th May. On that date Jamal Din stated that he did not wish for a declaratory decree but only for pre-emption. Bakhsha, plaintiff, stated: "I relinquish the claim to a declaratory decree for myself and for the minors." The Court did not give



its permission for the withdrawal of this part of the claim, nor did it purport to consider whether the withdrawal was for the benefit of the minors; it recorded an order to the effect that costs would be considered at the time of the final order. The case was then proceeded with and eventually a decree was given for pre-emption of the land in favour of Jamala and Rajada; but in the decree by mistake the names of all the four plaintiffs were entered. Jamala and Rajada appealed for reduction of the price as fixed by the Court. But eventually their suit was dismissed on the ground that they had not paid the sum ordered within the time fixed by the Court. Rajada and Sajada have now brought the present suit for a declaration to have the same alienation of land declared invalid as against them.

The Courts below have dismissed the suit on the ground that the plaintiffs were bound by the withdrawal of part of the previous suit on 8th May 1911, and the plaintiffs have thereupon filed a second appeal in this Court. It is contended on their behalf that the withdrawal does not bind them, mainly because it was without the leave of the Court, which did not consider whether it was in the interests of the minors. In the plaint in the present suit the previous suit was altogether ignored, no mention whatever being made of it. The defendant Ghulla however in his pleas referred to the previous suit; but plaintiffs were not called upon to put in any replication to his pleas; nor were they or their counsel orally examined in respect of them. If they had been, it is possible that fraud or negligence on the part of the next friend of the minors might have been specifically pleaded by them. Counsel for the appellants does not now urge that there was any fraud on the part of the next friend, but he urges that there was gross negligence, and he cites *Doraswami Pillai v. Thungasami Pillai* (1) and *Ram Sarup Lal v. Shah Latafat Hossein* (2) as authorities for the proposition that in the circumstances the plaintiffs are not bound by the withdrawal of the previous suit. In the *Doraswami Pillai v. Thungasami Pillai*'s case (1), where a suit, which was being conducted on behalf of a minor, was withdrawn without leave

being asked for or given to bring another suit, the order passed on the petition for withdrawal was set aside by the High Court on revision on the ground that it was prejudicial to the interests of the minor. The case of *Ram Sarup Lal v. Shah Latafat Hossein* (2) was one where the next friend of a minor plaintiff withdrew from the suit and it was held that it was open to the minor through another next friend to have the suit re-opened on review, on the ground that the former next friend, though guilty of no fraudulent conduct, was grossly negligent of the minor's interests in withdrawing from the suit. At p. 737 of the report the following passage occurs:

"Against such conduct as his, a minor is entitled to invoke the assistance of a Court of equity either by an application for review of judgment or by separate suit. As remarked by Lord Hardwick in *Gregory v. Molesworth* (3), the infant has such a remedy when either gross laches or fraud and collusion appear in the next friend."

This case may not strictly come within the terms of S. 462, Civil P. C., because it is not proved that the defendants entered into any agreement or compromise with the next friend of the infant, but it is within the scope of the general principle enunciated in Story's Equity Jurisprudence, S. 1353:

"In all cases where an infant is a ward of Court, no act can be done affecting the person, or property, or state of the minor, unless under the express or implied direction of the Court itself."

The present case is very similar to the one referred to above. No reason was given by the next friend for withdrawing the suit, nor was the Court asked to allow the plaintiff to withdraw from part of the suit with liberty to institute a fresh suit in respect of the subject-matter of such part, nor does the Court appear to have considered whether the withdrawal was in the interests of the minors or not. Under such circumstances, we consider that the minors can bring a separate suit for the relief which was abandoned in the previous suit. A Court should be very jealous of the interests of minors and should not allow a suit or part of a suit instituted on their behalf to be withdrawn without being satisfied that it is for their benefit. We accordingly accept the appeal and setting aside the orders of the lower Courts remand the case to the Court of first in-

(1) [1904] 27 Mad. 377.

(2) [1902] 29 Cal. 735.

(3) [1747] 3 Atk. 626=26 E. R. 1160.



stance for trial on the merits. Stamps in this and in the lower appellate Courts will be refunded and other costs will be costs in the case.

R.M./R.K.

*Case remanded.*

### A. I. R. 1919 Lahore 397

BROADWAY AND ABDUL RAOOF, JJ.

*Nanak Gir—Defendant—Appellant.*

v.

*Mt. Kishen Kaur and others — Plaintiffs—Respondents.*

Second Appeal No. 2397 of 1915, Decided on 10th May 1919, from decree of Dist. Judge, Ludhiana, D/- 19th July 1915.

**Hindu Law—Succession—Sister can succeed as bandhu especially as against stranger.**

Under the Hindu law a sister can come in as a bandhu 20 *All.* 191; and 14 *Mad.* 149, *Foll.*

The decision of the question however depends upon special circumstances of each case and on the consideration of the respective relationships of the parties. As against an utter stranger a sister of the deceased has undoubtedly a preferential right of succession. [P 398 O 1]

*N. C. Mehra—*for Appellant.

*Jagan Nath—*for Respondents.

**Judgment**—The facts giving rise to this suit out of which this appeal has arisen are the following: Nihal, Gir, a Subedar in the army, acquired the property in suit and was in possession of it till his death in 1897. He left on his death two widows Jai Dai and Naraini. After him his widow Jai Dai and his son Harnam Gir, succeeded to the property. Harnam Gir died in 1905 leaving a widow Mt. Khemi, two sons Bishen Gir and Kishen Gir and three daughters Mt. Kishen Kaur, Mt. Bishen Kaur and Mt. Santi. His share was inherited by his two sons Kishen Gir and Bishen Gir. The latter having died in 1907 was succeeded by his surviving brother. Mt. Jai Dai having died in 1908 Kishen Gir succeeded to her share also. Kishen Gir having died, the names of his grandmother Mt. Narain and her nephew (sister's son Nanak Gir) were entered in the revenue papers as his successors. Thereupon Mt. Khemi, the widow of Harnam Gir, and one Kanhya Gir, a nephew of Nihal Gir, instituted a suit against Mt. Naraini and Nanak Gir for the possession of the property in dispute. The case eventually came up in appeal before the Chief Court. During the pendency of the appeal in the Chief Court Mt. Naraini having died, the appeal was prosecuted by Nanak Gir alone

as the sole surviving appellant. It was contended on his behalf that assuming that he had no title to the land in dispute Kanhya Gir, respondent, had no right of succession in the presence of the daughters of Harnam Gir as the land was the self-acquired property of Nihal Gir. It may be noted here that Mt. Khemi, having contracted a second marriage, had been held by the Divisional Judge to have forfeited her life-estate as the mother of Kishen Gir. The dispute in the appeal was therefore between Nanak Gir on the one hand and Kanhya Gir on the other. It was admitted by the Counsel of Kanhya Gir at the hearing of the appeal before the Chief Court that the daughters of Harnam Gir had a right to succeed to the property in preference to his client. The learned Judges accordingly allowed the appeal on the ground that in the presence of the daughters of Harnam Gir, Kanhya Gir had no right to sue for the ejectment of Nanak Gir. The appeal was accordingly allowed and the suit was dismissed.

The present suit has now been instituted by the three minor daughters of Harnam Gir for the possession of the property in dispute, on the ground that under the law they are entitled to succeed to the property left by their brother Kishen Gir who has left no issue. The suit was contested by Nanak Gir, defendant, on the ground that he being the chela of Nihal Gir, who was a sanyasi, had a preferential right to succeed and that the plaintiffs as the sisters of Kishen Gir had no superior right of succession. Both the Courts below have held as a fact that Nanak Gir has failed to prove that he was a chela of Nihal Gir. They have held that the plaintiffs are entitled to succeed to the property left by Kishen Gir and have given a decree in favour of the plaintiffs for the possession of the property in dispute. Nanak Gir has come up in second appeal to this Court and 14 grounds of appeal have been taken in the memorandum of appeal on his behalf. Most of the pleas taken either challenge findings of fact or raise irrelevant questions. The only relevant question that has been urged before us and which we are called upon to decide, is whether under the circumstances of this case the plaintiffs are entitled to come in as the heirs of their brother Kishen Gir, the last owner. Having regard to the



rulings in *Multani Chand v. Lala Mal* (1), *Raghunath Kuari v. Munnar Mir* (2), *Mari v. Chinnamal* (3) and *Nallanna v. Ponnal* (4) referred to by the Court of first instance in its judgment, there can be no doubt that sisters can come in as Bandhus under the Hindu Law. The decision of the question will however depend upon the special circumstances of each case and on the consideration of the respective relationship of the contending parties. In this case however there is no difficulty in deciding the question, as the defendant Nanak Gir is admittedly an utter stranger and has no right to compete with the plaintiffs. He has failed to prove that he was a chela of Nihal Gir. In this view the decisions of the Courts below are correct and the appeal must fail. We accordingly dismiss it with costs.

R M./R K. • *Appeal dismissed.*

(1) [1889] 180 P. R. 1889.

(2) [1898] 20 All. 191.

(3) [1885] 8 Mad. 137.

(4) [1891] 14 Mad. 149.

### A. I. R. 1919 Lahore 398

SCOTT-SMITH, J.

*Rikhi Kesh and another*—Plaintiffs—Appellants.

v.

*Jwala Sahai and others*—Defendants—Respondents.

Second Appeal No. 2008 of 1917, Decided on 13th January 1919, from decree of Dist. Judge, Lahore, D/- 10th April 1917.

**Transfer of Property Act (4 of 1882), Ss 63 and 72—Improvement enhancing value—Cost not making redemption more difficult—Mortgagee is entitled to such costs.**

Where a mortgagee in possession expends money on permanent works on the property which enhance the value thereof, and the cost of such works does not make it difficult to redeem the property, he is entitled to be repaid his expenditure on redemption. [P 399 C 2]

*Brij Lal, Tek Chand and Moti Lal*—for Appellants.

*C. Bevan Petman and Daulat Ram*—for Respondents.

**Judgment.**—The facts of the case out of which the present appeal arises are fully stated in the judgments of the lower Courts and need not be repeated here. The only point upon which the plaintiffs' second appeal to this Court was admitted was whether the mortgagees in possession were entitled to compensation for improvements made by

them on the mortgaged property without the consent of the mortgagor. The lower Courts have held that the defendants are entitled to Rs 190 on account of annual repairs and Rs. 324 on account of additions to the mortgaged property. The lower appellate Court in discussing the point says :

"It has to be remembered in connexion with the additions that Pandit Janardhan was not merely mortgagee, but part owner, and entitled to add."

These remarks appear to have been made under a misunderstanding of the facts. The original mortgage was made on 3rd November 1883 and an additional mortgage was made on 15th April 1884. The mortgagee rights were transferred to Mt. Jawandi, wife of Pandit Janardhan, on 3rd June 1892. Sarb Sukh, the father of Janardhan and the grandfather of the plaintiffs, died in 1892. It is found that the additions to the property were made in the years 1885-87 at which time Pandit Janardhan was not a part owner. The additions were therefore made by him and his wife in the capacity of mortgagee and not that of part owner.

Bakhshi Tek Chand on behalf of the plaintiffs relies upon *Sher Singh v. Nihalu* (1), *Rupan Singh v. Champa Lal* (2) and S. 72, T. P. Act. In *Sher Singh v. Nihalu* (1) it was held that upon the facts proved the mortgagees were not entitled to claim compensation for the alleged improvements which, though they might bring in a profit, had unnecessarily diverted the land from its original uses, without the consent of the mortgagor and for the benefit of the mortgagee while in possession. In that case the improvement made was that a plantain garden had been planted on agricultural land and the mortgaged property had therefore been diverted from its original use and undergone a complete change. It was accordingly held that the expenditure, whether it brought a profit or not, could not be said to have been a reasonable one. In my opinion that case is clearly distinguishable from the present one. In *Rupan Singh v. Champa Lal* (2) it was held that the mortgagees' claim could not be allowed except in so far as it fell within the terms of S. 72, T. P. Act. The decision in that case was based entirely upon the section in

(1) [1896] 67 P. R. 1896.

(2) A. I. R. 1915 All. 99=26 I. C. 521=37 All. 81.



question, and the Transfer of Property Act is not in force in the Punjab and I am therefore not bound to follow it.

Mr. Petman on behalf of the respondents relies upon *Prab Dial Shah v. Bhai Sawaya Singh* (3) and the English case of *Shepard v. Jones* (4), in which it was held that if a mortgagee in possession has reasonably expended money in permanent works on the property, he is entitled, on prima facie evidence to that effect, to an inquiry whether the outlay has increased the value of the property, and if it has done so, he is entitled to be repaid his expenditure so far as it has increased such value. And in such case it is immaterial whether the mortgagor had notice of the expenditure. Notice to the mortgagor is only material when the expenditure is unreasonable, for the purpose of showing that he acquiesced in it. This case was discussed and the decision therein was followed in *Prab Dial Shah v. Bhai Sawaya Singh* (3), where in it was held that upon a consideration of all the circumstances the defendants were entitled to the whole of the money spent by them upon permanent improvements to the mortgaged property, the value of which had increased at least to the extent of the sum expended. At p. 303 (P. R. 1893) of the Report the following passage occurs :

"This is a case in which it would be clearly inequitable upon general principles of justice to allow the plaintiff the benefit of the defendants' outlay, without making him recoup the defendants for at least their actual expenditure, especially as this does not appear to be a case in which there is any danger, if no more than the actual sum spent is allowed, of the plaintiff being 'improved out of his estate'."

Now in applying the above remarks to the facts of the present case, it is necessary to see what are the additions which were made to the mortgaged property. Rs. 114.5.0 was spent on completion and setting right certain portions of the house; Rs. 205.9.0 was spent upon a dala which was added over the first floor; and Rs. 67.1.6 was spent on roofing a tawela. Now items 1 and 3 appear to have been necessary expenditure; and it is argued by Mr. Petman that the second was certainly not unreasonable and that it has improved the value of the property. The house is situate in the city of Lahore, and it is urged that a room on the roof in which

people can sleep in the hot weather is almost a necessity and certainly very greatly enhances the value of the property. I agree with counsel that none of the additions can be said to be unreasonable within the meaning of the authorities relied upon by him. It is also admitted that the plaintiffs are persons of means, who can easily afford to pay their share of the costs of the improvements. It is not alleged, and it is quite clear, that the cost of improvements has not made it difficult for them to redeem the property. I am therefore of opinion that the plaintiffs must pay their share of the costs of these improvements as well as costs of the annual repairs which were effected by the mortgagees.

The appeal accordingly fails and is dismissed with costs.

R M./R.K. *Appeal dismissed.*

### A. I R. 1919 Lahore 399

SHADI LAL J.

*Muhammad Din* — Convict — Petitioner.

v.

*Emperor* — Complainant — Opposite Party.

Criminal Petn. No. 772 of 1918, Decided on 23th November 1918, from order of Dist Magistrate, Sialkot, D/- 10th May 1918.

Criminal P. C. (1898), Ss. 423 (1) (4) and 522—Order restoring property to person entitled thereto is not consequential or incidental order—Appellate Court is not entitled to pass such order.

An order under S. 522, Criminal P. C., directing the restoration of immovable property to the person entitled thereto, cannot be regarded as a consequential or incidental order within the purview of S. 423 (1), Cl. (4) of the Code.

[P 400 C 1]

An appellate Court is not competent to make an order under S. 522, Criminal P. C., directing the restoration of immovable property to the person entitled thereto, where the trial Court has for some reason or other refrained from taking action under the aforesaid section: 39 Cal. 1050, *Foll*; 30 I. C. 159; 27 All. 415, *Dist*.

[P 399 C 2, P 400 C 1]

*Zafrulla Khan*—for Petitioner.

*Ganpat Rai*—for the Crown.

**Judgment.**—The sole question for consideration is whether the appellate Court was competent to make an order under S. 522, Criminal P. C., directing the restoration of the possession of immovable property to the person entitled thereto, when the trial Court had for some reason or other refrained from taking action under the aforesaid section. Now,

(3) [1898] 67 P. R. 1893.

(4) [1882] 21 Ch. D. 469.



Division Bench judgment of the Calcutta High Court in *Bhagbat Shaha v. Siddique Ostagar* (1) answers that question in the negative, and no authority has been cited on the other side which lays down that an appellate Court can pass an order of that character. The learned Judges of the Calcutta High Court hold that such an order cannot be regarded as a consequential or incidental order within the purview of S. 423 (1), Cl. (4), Criminal P. C., and this view is in their opinion supported by the fact that the legislature considered it necessary to enact a special section in order to confer the necessary authority upon a criminal Court so that it may exercise the power of restoring possession.

The matter is not entirely free from doubt, but I am not prepared to dissent from the view taken by the Calcutta Court. The judgement in *Ujir Sheikh v. Syed Ali Sheikh* (2), relied upon by Mr. Ganpat Rai, lays down that an appellate Court can set aside an order made by the Court of first instance under S. 522; but this judgment has obviously no bearing upon the question before me. The same remarks apply to the judgment of the Allahabad High Court in *Manki v. Bhagwanti* (3). Accordingly I accept the application for revision so far as to quash the order of the District Magistrate directing the restoration of the possession of the property. In all other matters the application for revision is rejected.

R.M./R.K. *Petition partly accepted.*

(1) [1912] 39 Cal. 1050=16 I. C. 176.

(2) [1915] 30 I. C. 159.

(3) [1905] 27 All. 415.

## A. I. R. 1919 Lahore 400

SCOTT-SMITH, J.

*Kartar Singh*—Plaintiff—Appellant.

v.

*Indar Singh* — Defendant — Respondent.

Second Appeal No. 2494 of 1917, Decided on 18th June 1918, from decree of Addl. Dist. Judge, Hoshiarpur, D/- 25th June 1917.

(a) Registration Act (16 of 1908), S. 17 — Compromise of suit relating to property not subject matter must be registered.

So far as a compromise relates to property extraneous to the suit, it requires registration and if unregistered, is inadmissible in evidence.

[P 402 C 1]

(b) Civil P. C. (1908), O. 23, R. 3—Compromise relating to non subject-matter is not binding.

A decree based on a compromise, in so far as it relates to property extraneous to the suit, is without jurisdiction and is inoperative.

[P 402 C 1, 2]

*Tek Chand*—for Appellant.

*Sheo Narain*—for Respondent.

**Judgment.**—The facts of the case out of which the present appeal arises are sufficiently given in the judgments of the lower Courts and need not be recapitulated at length. Briefly, Kartar Singh, plaintiff-appellant, as adopted son of Jaswant Singh, claimed a one-fourth share in a certain house called pohara from Indar Singh, defendant, a cousin of Jaswant Singh. In 1906 there was a dispute as to the status of Sundar Singh, pichhlag of Amar Singh: see pedigree table set forth in the judgment of the trial Court. Amar Singh had made a will in favour of Sundar Singh, and Indar Singh sued for a declaration that Sundar Singh was not the real son of Amar Singh and that on the death of the latter's widows the property left by him would go to the reversioners. Jaswant Singh was impleaded as a pro forma defendant, he being stated to be an heir who had not joined plaintiff in suing. A list of Amar Singh's property was attached to the plaint and included a one-fourth share of the pohara in dispute. That case was compromised on 28th November 1906. In accordance with the compromise most of the property left by Amar Singh was divided half and half between Indar Singh and Sundar Singh, but it was stipulated in regard to this pohara that the plaintiff Indar Singh would take the whole of it. It was further stated in the compromise that Indar Singh, Sundar Singh and Jaswant Singh agreed to it, and Jaswant Singh signed the compromise in token of his agreement. A decree was passed in accordance with the compromise, the whole of the pohara and not merely the one-fourth share claimed being entered therein. The lower Courts have dismissed the plaintiff's suit, on the ground that under that compromise Jaswant Singh gave up all his rights in the pohara in dispute. The lower appellate Court has held that the compromise, being a petition addressed to the Court informing it that the parties had compromised their dispute upon certain terms, did not require registration. It relied upon *Prabh*



*Dyal v. Gurmukh* (1) and *Khairulnisa v. Bahadur Ali* (2).

The plaintiff has filed a second appeal to this Court and two points are raised on his behalf:

(1) That the compromise of 1906 has been wrongly interpreted and that it really only intended to refer to the one-fourth share of the pohara which at that time was in dispute and (2) that if the compromise related to the whole of the pohara, it related to property extraneous to the suit, and that so far as it related to such property, it required to be registered and not having been registered, cannot be received in evidence.

It was also contended that the decree, so far as it related to any property which was not the subject of that suit, was without jurisdiction and inoperative. Firstly, in regard to the interpretation of the compromise. Lengthy arguments have been addressed to me upon this point, but it can, in my opinion, be settled in a few words without any difficulty. It is true that at that time it was only Amar Singh's share of the pohara that was in dispute, namely, one-fourth; but it does not follow from this that Indar Singh did not stipulate as a consideration for agreeing to the compromise that he would keep the whole of the pohara. The words entered in the compromise are clear in themselves and I do not see why we should reject the obvious meaning of them and suppose that the parties intended something else. I agree with the lower Courts that the intention of the parties at that time was that Indar Singh should take the whole of the pohara and not merely a one-fourth share which was then in dispute. Upon the second point the first case referred to is the decision of the Privy Council in *Pranal Anni v. Lakshmi Anni* (3). In that case a razi-nama was filed in Court and a decree was passed thereon, but the razi-nama was not registered in accordance with the Registration Act. In regard to this their Lordships remarked at p. 513:

"The razi-nama was not registered in accordance with the Act of 1877; but the objection founded upon its non-registration does not in their Lordships' opinion apply to its stipulations and provisions in so far as these were incorporated with, and given effect to by the order made upon it by the Subordinate Judge in the suit of 1885. The razi-nama in so far as it was submitted

to and was acted upon judicially by the learned Judge, was in itself a step of judicial procedure not requiring registration; and any order pronounced in terms of it constituted *res judicata*, binding upon both the parties to this appeal who gave their consent to it."

Now in that case as in those relied upon by the lower appellate Court, viz., *Prabh Dyal v. Gurmukh* (1) and *Khairulnisa v. Bahadur Ali* (2), the razi-nama only related to property then in suit and their Lordships of the Privy Council do not appear to have laid down that if it had dealt with matters not in suit, even then its registration would not have been necessary if a decree had been passed in accordance with it. This decision of the Privy Council has been referred to in many subsequent decisions of the Indian High Courts and has been differently interpreted. The next case referred to by Bakhshi Tek Chand on behalf of the appellant is that reported as *Birbhada Nath v. Kalpatru Panda* (4), wherein the following passages occur in the head-note:

"A consent decree in so far as it relates to properties which are the subject-matter of the suit in which the decree is made if not otherwise open to objection is valid, but is inoperative in so far as it purports to affect properties which are outside the suit. A petition of compromise purporting to declare the rights and interests of the parties to a suit in property worth more than one hundred rupees, and to deal with properties not included in the suit, must be registered and such a compromise, if unregistered is inadmissible in evidence and cannot be enforced between the parties as a binding contract. A petition of compromise in so far as it relates to properties in suit does not require registration under S. 17, Registration Act, and the decree in so far as it gives effect to the settlement touching such properties, operate as *res judicata*, in so far however as it gives effect to the settlement touching properties extraneous to the litigation the decree is clearly without jurisdiction and is inoperative in relation to these extraneous properties, the parties must fall back upon the petition itself, which cannot without registration effectively declare or create title to immovable property exceeding one hundred rupees."

This was followed in *Gurdeo Singh v. Chandrika Singh* (5), see last paragraph of the head-note. The same view was taken in *Ravula Parti Chelamanna v. Ravulaparti Rama Row* (6), in which a previous ruling of the same Court reported as *Natesan Chetty v. Vengu Nachiar* (7) was dissented from. *Raghubans Mani Singh v. Mahahir Singh* (8) adopts

(4) [1905] 1 O. L. J. 334.

(5) [1909] 36 O.L. 193=1 I. O. 919.

(6) [1913] 36 Mad. 46=12 I. O. 317.

(7) [1910] 33 Mad. 102=3 I. O. 701.

(8) [1906] 28 All. 78.

(1) [1902] 93 P. R. 1932.

(2) [1906] 27 P. R. 1906.

(3) [1899] 22 Mad. 508=26 I. A. 101 (P.O.).



the contrary view, but as pointed out in *Ravula Parti Chelamanna v. Ravulaparti Rama Row* (6), that decision was not followed in subsequent decisions of the same Court reported as *Sadaruddin v. Chajju* (9) and *Kashi Kunbi v. Sumer Kunbi* (10). Mr. Sheo Narain has cited *Ariyaputhra Goundan v. Ettiya Goundan* (11), but that case is distinguishable inasmuch as a minor was concerned there and the compromise as a whole was considered to be for his benefit and a decree was therefore passed embodying all the terms of the compromise. In that case the conflicting decisions in *Natesan Chetty v. Vengu Nachiar* (7) and *Ravula Parti Chelamanna v. Ravulaparti Rama Row* (6) were referred to, but the Court did not say which it approved of, but under the peculiar circumstances of the case adopted the view that the whole razinama must be taken to be submitted to and acted judicially upon by the Court and became part and parcel of the decree and was admissible in evidence without registration. In my opinion the correct view to take is that enunciated in *Birbhadra Nath v. Kalpatru Panda* (4), *Gurdeo Singh v. Chandrika Singh* (5) and *Ravula Parti Chelamanna v. Ravulaparti Rama Row* (6). I therefore held that so far as the compromise related to property extraneous to the suit, in other words, to three-fourths of the pohara, it required registration and not having been registered, it is inadmissible in evidence.

But Mr. Sheo Narain urges that even if the compromise required registration the decree which was passed by the Court is a good decree and is binding on the parties. Now O. 23, R. 3, Civil P. C., lays down that where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the suit. In connexion with the present case the important words of this rule are "so far as it relates to the suit." Now the suit in the case in question related to one-fourth

share in the pohara and not to the whole of it and therefore the decree should not have been passed as regards the whole of it. This was the view taken in *Birbhadra Nath v. Kalpatru Panda* (4), *Gurdeo Singh v. Chandrika Singh* (5) and *Hari Chand v. Maghi Mal* (12). In accordance with these authorities the decree, in so far as it relates to the property extraneous to the suit, was passed without jurisdiction and is inoperative. I therefore hold that the plaintiff's suit has been wrongly dismissed by the lower Courts on the sole ground that under the compromise of 1906 Jaswant Singh relinquished his share in the pohara in dispute. Counsel agreed that if the appeal was accepted on this ground, the case would have to go back for disposal of the other points raised.

I accordingly accept the appeal and setting aside the orders of the lower Courts; remand the case to the Court of first instance for re-decision in accordance with law. Stamps in this Court and in the lower appellate Court will be refunded and other costs will be costs in the case.

R M./R.K.

Case remanded.

(12) [1917] 78 P. R. 1917=40 I. C. 675.

### A. I. R. 1919 Lahore 402

SHADI LAL, J.

*Budha and others*—Defendants—Appellants.

v.

*Mul Raj and others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 2650 of 1917, Decided on 25th November 1918, from decree of District Judge, Gujranwala, D/-16th July 1917.

Limitation Act (9 of 1908) Art. 135—Suit by puisne mortgagee for possession—Cause of action runs from date of redemption of first mortgage—Failure of payment of part of consideration—Recovery of possession held not barred.

A puisne mortgagee is not bound to file a suit for possession of the mortgaged property within 12 years from the date of his mortgage where the property is not in the possession of the mortgagor but in that of the mortgagee: 18 O. C. 280, Diss. from. [P 403 O 2]

Limitation under Art. 135, Sch. 1, Lim. Act, against a puisne mortgagee does not begin to run until the redemption of the first mortgage and he is entitled to bring his suit for possession within 12 years from the date of redemption. 38 P. R. 1894; 1 All. 325 (P.C.), Foll. [P 403 O 2, P 404 O 1]

Plaintiff, a puisne mortgagee, sued for possession of the property mortgaged after having effected the redemption of the previous mortgage.

(9) [1909] 31 All. 13=1 I. C. 558.

(10) [1910] 32 All. 206=5 I. C. 234.

(11) [1917] 42 I. C. 228.



The mortgage in favour of the plaintiff was made on 14th February 1895. Although it was nominally with possession, the first mortgagee was in possession through his tenant, the mortgagor. In 1907 the plaintiff brought a suit for redemption against the prior mortgagee and obtained a decree. It appeared that he paid off the previous mortgagee but could not recover possession because the mortgagor succeeded in obtaining possession of the land :

*Held* : (1) that plaintiff's cause of action arose when the first mortgagee was paid off and that the suit was therefore within time; (2) that the fact that plaintiff had not succeeded in proving the payment of a part of the consideration for the mortgage did not debar him from recovering possession of the property: 53 P. R. 1916 (F. B.), *Foll.* [P 405 C 1]

G. C. Narang—for Appellants.

Shamair Chand—for Respondents.

**Judgment.**—This second appeal arises out of an action brought by one Mul Raj, the puisne mortgagee of the land in dispute, for possession thereof after having effected the redemption of the previous mortgage. The main question for consideration is whether the suit is barred by time under Art. 135, Lim. Act. The mortgage in favour of the plaintiff was made on 14th February 1895; and though it was nominally with possession, it is beyond dispute that the first mortgagee was in possession of the property through his tenant, the mortgagor. In 1907 the plaintiff brought a suit for redemption against the prior mortgagee and obtained a decree in his favour. The learned District Judge finds, and his finding cannot be assailed in second appeal, that the previous mortgagee has been paid off by the plaintiff, but it appears that the latter could not recover possession because the mortgagor succeeded somehow or other in obtaining possession of the land. There is documentary evidence to the effect that the mortgagor cultivated the land as the tenant of the first mortgagee up to 1902, and that the latter then left it to other persons. The application of the mortgagor dated 8th May 1914 makes it clear that he again obtained possession some time in 1911, and there can be little doubt that his possession was then unlawful as against the plaintiff. Mr. Gopal Chand Narang for the appellants contends that the plaintiff's right to sue for possession accrued in 1895, when the mortgagor's right to possession determined; and invites my attention in support of his argument to certain observations contained in a judgment of the Additional Judicial Commis-

sioner of Oudh in *Husaini v. Ram Charan* (1).

A perusal of that judgment shows that the observations with respect to limitation were purely obiter dicta. In any case I am not prepared to concur in the proposition that the puisne mortgagee is bound to file a suit for possession within 12 years from the date of his mortgage, even when the property is not in the possession of the mortgagor but is in possession of the prior mortgagee. It seems to me that a suit of that kind, if filed before the redemption of the prior mortgage, is bound to be dismissed, as against the mortgagor on the ground that he is not in possession of the property and as against the prior mortgagee on the simple plea that the mortgage in his favour has not yet been redeemed. Art. 135 distinctly contemplates that the possession is with the mortgagor, and that the mortgagee is entitled to hold the property as against the latter. I do not think that the aforesaid article has any application to a case of this kind. In *Narain Singh v. Shimbhoo Singh* (2), a case which is on all fours with the present one, their Lordships of the Privy Council made the following pertinent observations :

"It appears however to their Lordships that the plaintiff having a good title when the first mortgagees were paid off in 1870, their cause of action accrued when the defendants (i. e., the mortgagors) after that period entered into possession of the estate to which they had no title."

The learned counsel for the appellants contends that this judgment was delivered with reference to the Limitation Act of 1871, which provided a period of 12 years from the date "when the mortgagee is first entitled to possession"; and that the Limitation Act of 1877 made the date of the determination of the mortgagor's right to possession as the terminus a quo for the period of limitation. Now, it is doubtful whether this change of phraseology has made any real difference in the law; and a Division Bench judgment of this Court reported as *Ghanaya v. Pandit Chhajju Ram* (3), which was delivered after the enforcement of the Limitation Act of 1877, follows the aforesaid Privy Council ruling, and lays down that the limitation against a puisne mortgagee does not begin to run until the re-

(1) [1898] 18 O. C. 290=92 I. C. 341.

(2) [1875-78] 1 All. 825=4 I. A. 15 (P. C.).

(3) [1894] 88 P. R. 1894.



demption of the first mortgage and that he is entitled to bring his suit for possession within 12 years from the date of redemption. This judgment is binding upon me, and I am not prepared to hold that the rule of law enunciated therein is erroneous. For these reasons I hold that the suit is within time.

The fact that the plaintiff has not succeeded in proving the payment of a part of the consideration for the mortgage does not debar him from recovering possession of the property. As laid down by the Full Court in *Allah Ditta v. Nazar Din* (4), the transfer is perfectly valid, and the question whether the entire mortgage money has or has not been paid does not arise in this case. The observations per contra in *Husini v. Ram Charan* (1) cannot be followed in the face of the judgment of the Full Court in *Allah Ditta v. Nazar Din* (4). As to the contention that the area decreed to the plaintiff is more than what is mentioned in the mortgage-deed in his favour, it is sufficient to say that the learned District Judge after giving his reasons to account for the excess, offered to remand the case, but the appellants declined the offer. Accordingly I confirm the decree of the District Judge, and dismiss the appeal with costs.

R.M./R.K.

*Appeal dismissed.*

(4) [1916] 53 P. R. 1916=33 I. C. 474 (F. B.).

**A. I. R. 1919 Lahore 404**

ABDUL RAOOF, J.

*Mt. Yakub Jan*—Plaintiff—Appellant.

v.

*Mt. Rahmat Nur and others*—Defendants—Respondents.

Second Appeal No. 1332 of 1918, Decided on 20th March 1919, from decree of Dist. Judge., Rawalpindi, D/- 21st March 1918.

Registration Act (1908), S. 48—Suit for possession by partition of half house on allegation that it was orally given by father-in-law as part of dower—Widow and daughter of father-in-law pleading subsequent gift of entire house by registered deed—Widow proved to be present at nikah when half share was given to plaintiff—Transfer in favour of plaintiff is sale and not gift—Widow having notice of oral transfer could not claim benefit of rule in S. 48.

Plaintiff sued for possession by partition of half of a house alleging that it had been given to her orally by her father-in-law as part of her dower. The defendants, the widow and daughters of the deceased father-in-law, pleaded a subsequent gift by registered deed of the entire house by him in

favour of his wife and contended that the oral transfer in favour of the plaintiff, even if proved, could not prevail. It appeared that the defendant widow was present at the nikah when the half share in dispute was given to the plaintiff.

*Held:* that inasmuch as the oral transfer made in favour of the plaintiff was in consideration of a portion of her dower, it was a sale rather than a gift; (2) that as the defendant widow had notice of the oral transfer previously made, it was not open to her to claim the benefit of the rule laid down in S. 48. [P 405 C 2; P 406 C 1]

*Nanak Chand*—for Appellant.*Jai Gopal Sethi and R. Obbard*—for Respondents.

**Judgment.**—One Ghulam Hussain was married to Mt. Rahmat Nur. He had a son Nazar Hussain and two daughters Sardar Begam and Shahjehan Begam. His mother's name was Murad Begam. While yet his son Nazar Hussain was a minor, Ghulam Hussain got him married to Yakub Jan who too was a minor. This lady Yakub Jan has filed the present suit on the allegation that at the time of the marriage Ghulam Hussain gave her half of the house in dispute with Rs. 100 as part of her dower, that she came and occupied a portion of the house and lived in it for some time; that on the death of Ghulam Hussain, unpleasantness having arisen between the members of the family who resided in the house, the plaintiff locked up the portion of the house occupied by her and left it and took residence with her husband in another house; that recently Mt. Rahmat Nur broke open the lock and took possession of the portion of the house in which the plaintiff used to live. She claimed possession over half of the house by partition. Ghulam Hussain's mother Murad Begam, Mt. Rahmat Nur and the two daughters of Ghulam Hussain, the father-in-law of the plaintiff, were made defendants to the suit. Nazar Hussain admitted the claim of the plaintiff. Rahmat Nur principally contested the claim and two main pleas were urged on her behalf, namely, (1) that the story of the transfer of the house in favour of the plaintiff as part of her dower was untrue and (2) that inasmuch as the transfer was made only orally and not by a registered deed, it could not prevail as against the deed of gift of the entire house made in her favour by Ghulam Hussain on 13th July 1915, as it was a registered document and to be preferred under S. 48, Registration Act. After the nikah (marriage ceremony) an entry relating to the marriage and to the giving



of the house as part of the dower was made in the register of marriages. As regards this also a plea was put forward in defence in the alternative that as this entry was unregistered, it was inadmissible in evidence and the fact of the transfer could not be proved.

The Court of first instance framed two issues, namely, whether Ghulam Hussain, deceased, did give half share of the house in suit to the plaintiff in part payment of her dower; (2) if so, what was the effect of the deed of gift dated 13th July 1915, of the plaintiff's right. On a consideration of the evidence on the record, the Court of first instance came to the conclusion that the transfer relied upon by the plaintiff was established. As regards the question of the want of registration of the entry in the marriage register, that Court held that the transfer which was relied upon was an oral one and the entry in the register was simply a memorandum of the arrangement or contract that had been effected between the parties. It therefore held that no registration was necessary. On issue 2, it came to the conclusion that at the time Ghulam Hussain executed the deed of gift on 13th July 1915 in favour of Mt. Rahmat Nur, he was living under her influence and complete control and was ill. Therefore, the document was of no avail as it was not executed with the free will of the executant. In the alternative the Court also held that even if the executant was free and had willingly executed the deed relating to the entire house in favour of Rahmat Nur, he had no power or right to execute this deed of gift affecting the half share which had already been transferred to the plaintiff. Upon this finding the Court of first instance decreed the claim of the plaintiff. Mt. Rahman Nur, Murad Begam, and the two daughters of Ghulam Hussain, namely, Sardar Begam and Shah-jahan Begam, preferred an appeal to the lower appellate Court.

As regards the question of the transfer of half the house to the plaintiff in part payment of her dower, the lower appellate Court agreed with the decision of the Court of first instance. It also agreed with the first Court as to the finding that the entry in the marriage register did not require registration, inasmuch as it only amounted to a memorandum of an oral agreement or contract. As regards the question whether Ghulam Hussain was under th-

influence and control of Mt. Rahmat Nur the learned Judge came to a different conclusion. He held that the evidence on the record did not justify a finding that any kind of control or influence had been exercised by Rahmat Nur on Ghulam Hussain. As regards the effect of the deed of gift of 13th July 1915 in favour of Rahmat Nur, he was of opinion that having regard to the provisions of S. 48 the registered deed of gift was preferable to the oral transfer made in favour of the plaintiff. The learned Judge of the Court below treated the oral transfer in favour of the plaintiff as a transaction amounting to gift and held that as it was not followed by possession, it could not take effect as against the registered deed in favour of Rahmat Nur.

Taking this view the lower appellate Court set aside the decree and judgment of the Court of first instance and dismissed the suit of the plaintiff. She has come up in second appeal to this Court. The first question that has been argued before me by the learned counsel for the appellant is that as found by the lower appellate Court itself the plaintiff did get into possession after her marriage and that in any case she being a minor, the possession of Ghulam Hussain under whose guardianship she was living in the house must be looked upon as the possession of the minor. In my opinion there is force in this argument, but I need not base my judgment upon this ground alone. In my opinion the oral transfer made in favour of the plaintiff of half the house was in consideration of a portion of her dower. In other words, the transfer was made for consideration. Such a transfer more appropriately comes under the definition of a sale than that of a gift.

The learned Judge of the Court below has relied upon the provisions of S. 48, Registration Act, in holding that the deed of gift in favour of Mt. Rahmat Nur was to be preferred and that the plaintiff was not entitled to succeed as against her. There is evidence in this case, and it has not been denied, that Mt. Rahmat Nur was present at the nikha when this half share was given to the plaintiff as part of her dower by her father-in-law Ghulam Hussain. The Court of first instance found clearly that the transfer in favour of the plaintiff was made with the knowledge of defendant 1, namely, Mt. Rahmat Nur. This finding is justified by the



evidence on the record. The learned Judge of the lower appellate Court, while applying the provisions of S. 48, Registration Act, lost sight of the fact that as Mt. Rahmat Nur had had notice of the oral transfer, it was not open to her to claim the benefit of the rule laid down in S. 48. There is authority for this proposition in reported cases, for example see *Hardit Singh v. Behari Lal* (1). In my opinion the decree passed by the Court of first instance was a right decree. I set aside the judgment and decree of the lower appellate Court and restore those of the first Court with costs in all Courts.

R.M /R.K. *Appeal allowed.*

(1) [1915] 29 I. C. 305.

### A. I. R. 1919 Lahore 406

LE ROSSIGNOL AND MARTINEAU, JJ.

*Muhammad Ramzan Khan and others*  
—Plaintiffs—Appellants.

v.

*Mt. Sardar Begam and others*—Defendants—Respondents.

First Appeal No. 424 of 1915, Decided on 4th December 1918, from decree of Dist. Judge, Lahore, D/- 11th May 1914.

(a) Mahomedan law—Guardian—Mother not natural guardian—Act of mother advantageous to minor—Act is binding.

Although according to Mahomedan law a mother is not a natural guardian, yet her action,

when no natural guardian is in existence, which is obviously and manifestly to the advantage of her minor child, is binding on the minor.

[P 407 C 1]

(b) Civil P.C. (1908), Sch. 2, paras. 20, 21.—Time within which award to be issued depends on particular facts—Parties have right to call upon to make award or renounce appointment.

The period of time within which arbitrators should issue their award depends upon the facts of each particular case, and it is always open to either party to call upon the arbitrators either to give their award or to renounce their appointment.

[P 407 C 2]

(c) Civil P. C. (1908), Sch. 2, paras. 20, 21.—Award after unreasonable amount of delay—Award should be regarded with great suspicion.

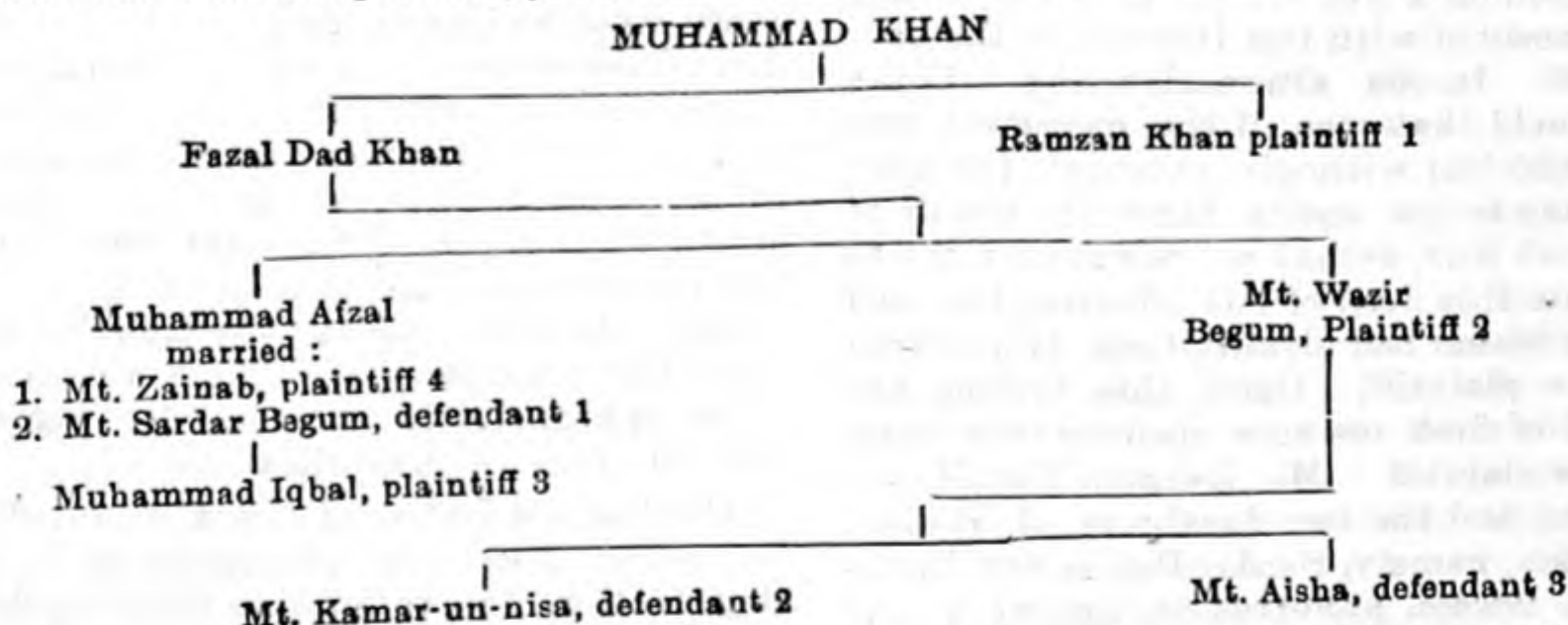
Where an unreasonable amount of delay occurs, and the issue of the award, after a long period of inactivity, synchronises with a dispute between one of the arbitrators and the attorney of one of the parties, the award must be regarded with great suspicion.

[P 407 C 2]

*Moti Lal*—for Appellants.

*Badr-ud-Din Kureshi*—for Respondents.

**Judgment.**—This appeal arises out of an application under O. 20, Sch. 2, Civil P. C. to have an award, made on a reference to arbitration without the intervention of the Court, filed in Court and a decree passed in accordance therewith. The following pedigree table will explain the relationship between the parties:



Ramzan Khan and Muhammad Afzal were disputing concerning their joint property during the lifetime of Muhammad Afzal and on the death of the latter in order to put an end to those disputes, the parties signed a reference to arbitration on 11th June 1905. Owing however to the resignation of one arbitrator that reference proved abortive and a fresh one was signed on 28th July 1905, by which Mubarik Ali Shah and Chaudhari Barkat Khan were appointed

arbitrators with Pir Sardar Shah as umpire. The District Judge dismissed the suit, on the ground that the minor defendants, Mt. Kumar-un-nisa and Mt. Aisha, were not properly represented in the reference to arbitration inasmuch as their mother, Mt. Sardar Begam, was not their legal guardian; secondly, that the reference was not acted upon; and thirdly, that the arbitrators were guilty of misconduct. Although the reference to arbitration, as stated above, is dated



28th July 1905, the award is dated 1st March 1910, but from the statement of Mubarik Ali Shah it is doubtful whether the award, though purporting to have been written on 1st March 1910, was announced to the parties before 17th March 1910. We have been through the proceedings of the arbitrators and find that by January 1906 the arbitrators had practically concluded their inquiry. After that date the parties resorted to litigation and the arbitrators did nothing more till December 1908, when in the absence of the respondents, who refused to attend the proceedings, they recorded two further statements and closed the proceedings.

Even then they issued no award. In March 1909 they purchased a stamp-paper, evidently at the instance of the appellant, but even then they failed to make their award and no further step was taken by them till apparently 17th March 1910, when the award was issued, and it is a significant fact that the arbitrators were aroused to action just at the time when proceedings of a criminal nature were taking place between the plaintiff's arbitrators, Mubarik Ali Shah and Sardar Khan, the respondents' attorney, and it is a striking circumstance that the date on which the award was promulgated was the very date on which one Maula Bakhsh, with whom was associated Sardar Khan, brought a criminal complaint against Mubarik Ali Shah. With regard to the District Judge's finding that the minor defendants were not properly represented in the reference to arbitration, one only of them, Mt. Kumar-un-nisa, has raised this objection through a guardian ad litem, Jahangir. Although her mother was not a natural guardian according to Mohamadan law, it appears that at the time no such natural guardian was in existence and the action of the mother on behalf of her minor child, we should hold in such circumstances, bound the minor, for it is obviously and manifestly to the advantage of the minor that a claim in which she was interested should be decided by an honest arbitration rather than by resort to the Court.

With regard to the finding that the reference was not acted upon, we have no doubt that for sometime, at any rate, the reference was acted upon. The parties were represented before the arbi-

trators and a certain amount of inquiry was made by the latter, but it seems that after January 1906 neither the arbitrators nor the respondents were anxious to proceed with the arbitration. What period of time should be allowed to arbitrators for issuing their award is a matter which must be decided with reference to the facts of each case, and it is always open to either party to call upon the arbitrators either to give their award or to renounce their appointment. In this case it appears to us there has been an unreasonable amount of delay and that the arbitrators at one time were not anxious to complete their proceedings, and we must regard with great suspicion the circumstance that the issue of the award after a long period of inactivity on the part of the arbitrators synchronized with a dispute between Mubarik Ali Shah and Sardar Khan, the attorney of Mt. Sardar Begam. In such circumstances we cannot but hold that the interests of Mt. Sardar Begam were likely to be prejudiced by the quarrel between Mubarik Ali Shah and Sardar Khan, and taking all the circumstances into consideration we cannot regard Mubarik Ali Shah as a fair and disinterested arbitrator in the case.

For these reasons we do not think that it would be in consonance with either equity or the law to direct the filing of the award and we dismiss the appeal with costs.

R.M./R.K.

*Appeal dismissed.*

### A. I. R. 1919 Lahore 407

BROADWAY, J.

*Nathu Ram—Defendant—Appellant.*

v.

*Shadi Ram and another—Plaintiffs and Defendant—Respondents.*

Second Appeal No. 2415 of 1918, Decided on 27th January 1919, from decree of Senior Sub-Judge, Ludhiana, D/- 13th July 1918.

(a) Transfer of Property Act (1882), S. 60—Hard terms are not clog.

The mere fact that the terms of a mortgage are hard is not sufficient to hold them to be so onerous as to form a clog on redemption.

[P 408 O 2]

(b) Evidence Act (1872), S. 115—Man entering into contract with eyes open cannot ask for relief from consequences thereof.

A man who enters into a transaction with his eyes open and without any undue influence being brought to bear on him cannot ask to be relieved from the natural consequences of his action.

[P 408 O 2]



*Tek Chand*—for Appellant.

*G. C. Narang*—for Respondents.

**Judgment.**—On 14th November 1917 Ismail mortgaged a certain house to Nathu Ram for Rs. 95. The terms of the mortgage were: (1) the house could not be redeemed for a period of 30 years; (2) interest was payable at the rate of 12 annas per cent; (3) interest was to be calculated every four years and then added to principal if not paid; (4) the mortgagee (who was given spossession) was at liberty to re-build the house as he pleased and the cost incurred was to be repaid with interest at the time of redemption. On 17th November 1917 Ismail executed a second mortgage in favour of Shadi Ram and Daulat Ram for Rs. 400. The second mortgagees were to pay off the first mortgagee and were to keep possession of the house for 25 years. The rate of interest was at Re. 1 per cent. per mensem but no provision was made for adding interest unpaid to the principal. The second mortgagees could however re-build as they pleased and the cost so incurred was payable with interest at the time of redemption. The two sets of mortgagees, it is said, are relations who are bitter enemies. Shadi Ram and Daulat Ram instituted the present suit claiming possession and offering to pay off the first mortgagees. They alleged that the terms of the first mortgage were so onerous as to amount to a clog on redemption and should be set aside in equity.

The trial Court held that Ismail had executed the first mortgage without any undue influence or pressure and after fully understanding what he was doing, and holding that the plaintiffs were not entitled to sue for possession before the expiry of the 30 years dismissed their suit. The plaintiffs thereupon appealed to the Senior Subordinate Judge, who held that the terms of the first mortgage were onerous and liable to be set aside in equity and granted the plaintiffs a decree for possession on payment of Rs. 95 (the mortgage money) and Rs. 20, the cost of the improvements made. Nathu Ram has now preferred this second appeal to this Court through Mr. Tek Chand and I have heard Mr. G. C. Narang for Shadi Ram and Daulat Ram. Mr. Narang cited *Gansham v. Budha* (1),

*Ladha Mal v. Jagannath* (2), *Sukh Dial v. Anant Ram* (3), *Ganda Mal v. Dheri Shah* (4), *Sher Muhammad v. Fatteh Din* (5), *Sardar Balwant Singh v. Sardar Kirpal Singh* (6) and *Rehana v. Zaman* (7) as instances where this Court had granted equitable relief when the conditions of a mortgage had amounted to a clog on redemption. In cases of this nature the circumstances of each case have to be considered. Mr. Tek Chand contended that in the absence of undue influence there was no reason to set aside the conditions of the mortgage and cited *Balla Mal v. Ahad Shah* (8) as authority for the proposition that the Courts have to look at the transaction as made and not to the ultimate results.

It seems to me that the mere fact that the terms of the mortgage are hard is not sufficient to hold them to be so onerous as to form a clog on redemption and that a man who enters into a transaction with his eyes open and without any undue influence being brought to bear on him cannot ask to be relieved from the natural consequences of his action. In the present case it is not Ismail who is seeking to avoid the transaction but a subsequent mortgagee who entered into his mortgage with full knowledge of the terms of the first mortgage. In the cases cited by Mr. Narang relief was given to the successors in title to the mortgagor, who then were enabled to pay off the mortgage and redeem the property mortgaged. Doubtless as contended by Mr. Narang the present mortgagees are in a sense "successors" to the mortgagor Ismail, but it is not Ismail who stands to gain any benefit from any relief that may be granted to the respondents.

Between the terms of the two mortgagees there is little or nothing to choose and there is no reason why the respondents should be favoured at the expense of the appellant. The relief they are claiming is an equitable one and they certainly have not come into Court with clean hands. Dr. Narang then urged that the case should be remanded to the lower appellate Court for a decision on

(2) [1888] 123 P. R. 1888.

(3) [1894] 131 P. R. 1894.

(4) [1895] 99 P. R. 1895.

(5) [1902] 6 P. R. 1902.

(6) [1909] 4 I. C. 632.

(7) [1911] 11 I. C. 519.

(8) A. I. R. 1918 P. C. 249=48 I. C. 1=124 P. R. 1918, (P. C.).

(1) [1876] 119 P. R. 1876.



the question of undue influence. The circumstances of the case are such however that I am unable to see any reason for the adoption of such a course. It seems to me quite clear that the plaintiffs-respondents have entered into this transaction and brought this suit to annoy and harass Nathu Ram and not with a view to benefiting Ismail in any way. They have attempted to get the better of their enemy and deserve no consideration. I accordingly accept this appeal and dismiss the suit with costs throughout; the costs to be payable by Shadi Ram and Daulat Ram and not Ismail.

R.M./R.K.

*Appeal accepted.*

### \* A. I. R. 1919 Lahore 409

RATTIGAN, C. J.

*Labhu and another*—Accused—Petitioners.

v.

*Emperor*—Opposite Party.

Criminal Revn. No. 1367 of 1918, Decided on 25th February 1919, from order of Sessions Judge, Amritsar, D/- 12th December 1918.

\* Criminal Trial—Abatement—On death of complainant, trials under offences compoundable without reference to Court are only abated.

On the death of a complainant during the pendency of a trial the proceedings abate if the offence complained of was personal to the complainant, that is, if it was one which could be compounded without the sanction of the Court. In other cases, the proceedings do not abate.

[P 409 C 1]

**Facts.**—The accused, on conviction by Mahant Raghbir Singh exercising the powers of a Magistrate of the 1st Class in the Amritsar District, were sentenced, by order dated 23rd November 1918, Labhu under S. 325, I. P. C., to one month's rigorous imprisonment, and Bhagtu under S. 323, I. P. C., to pay a fine of Rs. 50 or in default to undergo one month's rigorous imprisonment.

**Grounds.**—Though the death of the complainant during the pendency of the proceedings has not been made a ground of revision, the file shows that the complainant Fazal Din had died prior to 14th November 1918, and from the statement of his mother before me it appears that he died at the end of October. It is clear therefore from *Rama Nand v. Emperor* (1) that the right to carry on the prosecution under S. 323, I. P. C., did not survive to the legal represen-

tative of Fazal Din, and I think that a prosecution under S. 325 must stand on the same footing, the only reason which could exist for making a distinction being that the composition of an offence under S. 325, I. P. C., requires the sanction of the Court.

I accordingly recommend that the convictions be set aside, and have directed that the accused Labhu be released on bail pending the orders of the Chief Court.

**Order.**—In this case Bhatgu was charged with having committed an offence under S. 323, I. P. C., and Labhu was charged at the same trial with having committed an offence under S. 325, I. P. C., the complainant being one Fazal Din who died during the progress of the trial. Labhu was convicted and sentenced to one month's rigorous imprisonment and Bhagtu was also convicted and directed to pay a fine of Rs. 50. The proceedings have been forwarded for revision by the Sessions Judge, Amritsar, on the ground that the right to carry on the prosecution abated on the death of the complainant and that consequently the accused persons should not have been convicted. *Rama Nand v. Emperor* (1) is authority for holding that the charge under S. 323, I. P. C., was in respect of an offence personal to the complainant and that upon the complainant's death proceedings in respect to that charge must be deemed to have abated. Acting upon this authority, so far as Bhagtu is concerned, I accept the recommendation of the Sessions Judge and set aside the conviction and direct the fine, if levied, to be refunded. It appears to me, however that there is an essential difference in this respect between cases falling under S. 323 and S. 325, I. P. C., inasmuch as the former are compoundable without the sanction of the Court, whereas an offence under S. 325, I. P. C., cannot be compounded unless the Court expressly grants sanction. While, therefore the former cases may be held to be personal to the complainant, the latter cannot fall within the same category. I therefore uphold the conviction of Labhu, but as he has already suffered nineteen days' imprisonment, I reduce his sentence to the amount of imprisonment already undergone by him.

R.M./R.K.

*Petition partly accepted.*  
(1) [1917] 26 P. R. 1917 Cr.=40 A. O. 1008.



## A. I. R. 1919 Lahore 410

SCOTT-SMITH, J.

*Jamiat Singh and others*—Plaintiffs—Appellants.

v.

*Mt. Raji and another*—Defendants—Respondents.

Second Appeal No. 1608 of 1918, Decided on 15th January 1919, from decree of Dist. Judge, Ambala, D/- 14th February 1918.

(a) Limitation Act (9 of 1908), S. 10—Suit for recovery of trust property against trustee of shrine and his donee—S. 10 applies.

A suit for recovery of property against a person in whom the property has become vested in trust for the upkeep of a shrine and against his assign who is not an assign for valuable consideration for instance a donee, is covered by the provisions of S. 10. [P 411 C 1]

(b) Religious endowment—Shrine—Trustee can acquire private property of his own.

The custodian of a shrine who is not a member of a religious fraternity is not incompetent to acquire private property of his own. [P 411 C 1]

*Sewa Ram Singh*—for Appellant.

*Gullu Ram*—for Respondents.

**Judgment.**—In the suit out of which the present appeal arises plaintiffs sued Mt. Raji, donor and Mt. Kishni, donee for ejectment of the latter from two plots of land gifted by the former to the latter. The suit was brought on the ground that the land was attached to the gurdawara of Shahid Ganj and that Mt. Raji had no authority to alienate them. The plots are (a) 6 bighas, 19 biswas and (b) 11 bighas 15 biswas. The first Court held that the plot (a) was attached to gurdawara and that Mt. Raji had no power to make a gift of it but that the plot (b) was gifted to Ram Singh, the husband of Mt. Raji, and was not attached to the gurdawara and that therefore the plaintiffs had no locus standi to object to the gift of it. It therefore gave a decree as regards plot (a) and dismissed the suit as regards plot (b). The lower appellate Court agreed as regards plot (b) with the decision of the first Court. As regards plot (a) it was of opinion that the only suit which plaintiff could bring in regard to it was one for a declaration and that such a suit was time-barred not having been brought within six years of the date of gift.

Plaintiffs have filed a second appeal to this Court. With reference to plot (a) it is quite clear from the revenue records that it was originally granted for the upkeep of the shrine. The muafi file shows

that the muafidar had no power to alienate it. This fact is not seriously contested before me. The lower Appellate Court's view that the only suit that could be brought in regard to this plot was one for a declaration does not appear to be correct. The learned District Judge relies upon *Kazi Hassan v. Sagun Balakrishna* (1). In that case the plaintiffs sued to recover possession of certain lands alleging that they had been granted in wakf to their ancestor and his lineal descendants to defray the expenses for or connected with the services of a certain mosque; that their father and cousins, who were muttwalis in charge of the said property, had illegally alienated some of these lands, and had also ceased to render any service to the mosque. It was held in that case that the plaintiffs were entitled to sue to have the alienation set aside and the wakf property restored to the service of the mosque. It was also held that wakf property could not be alienated and that any person interested in the endowment could sue to have the alienations set aside and the property restored to the trust. In the present case the plaintiffs do not sue for possession for themselves. They sue to dispossess the alienee. In other words, they wish that the property should be restored to the purpose for which it was granted. It is not contended now by Counsel for respondents that the suit for dispossession of the donee cannot lie.

It is however contended that the suit is barred by time and the following authorities are cited:—*Narain Singh v. Ishar Singh* (2), *Asa Ram v. Paras Ram* (3) and *Achar Singh v. Badhawa Singh* (4). In the case reported as *Asa Ram v. Paras Ram* (3) the plaintiff brought a suit as reversioner to contest an alienation made by the last manager of the endowed property and asked for the disposssession of the assignee in favour of the endowment. It was held that the limitation applicable to such a suit was that prescribed by S. 120, Sch. 2, Limitation Act. In *Narain Singh v. Ishar Singh* (2) the facts were somewhat similar and it was held that Art. 120 applied. In both these cases however the alienation was for valuable consideration and therefore

(1) [1900] 24 Bom. 170.

(2) [1899] 8 P. R. 1899.

(3) [1904] 9 P. R. 1904.

(4) [1912] 124 P. R. 1912=15 I. C. 285.



S. 10, Lim. Act did not apply. S. 10 is as follows:—

"Notwithstanding anything hereinbefore contained, no suit against a person in whom property has become vested in trust for any specific purpose, or against his legal representatives or assigns (not being assigns for valuable consideration), for the purpose of following in his or their hands such property or the proceeds thereof or for an account of such property or proceeds, shall be barred by any length of time."

Now the present suit is one against a person in whom property has become vested in trust for the upkeep of a shrine and against her assign who is not an assign for valuable consideration and therefore in my opinion S. 10, Lim. Act applies and the suit is not barred by time. I therefore hold that the plaintiffs are entitled to a decree as regards plot (a). As regards plot (b), however the case stands on a different footing. The record shows that it was gifted to Ram Singh as dharamarth. The meaning of the word dharamarth was considered in *Gurdit Singh v. Sher Singh* (5) to be a charitable grant or a religious endowment. There is no evidence of any sort to show that the gift of this plot was made to Ram Singh in his capacity as custodian of the shrine. It was in my opinion made to him as a private person. Mr. Sewa Ram Singh refers to Art. 89 of Rattigan's Digest which is to the effect that all property acquired by individual members of a religious fraternity belongs as a general rule to the religious institution to which they are attached and from this he argues that plot (b), which was acquired by Ram Singh, belongs to the shrine of which he was a custodian. In my opinion this argument has no force. Ram Singh was the custodian of a shrine and not one of the members of a religious fraternity. No authority was cited in support of the proposition that the custodian of a shrine such as Ram Singh cannot acquire private property of his own. I therefore hold that the plaintiffs have no locus standi in regard to plot (b).

I accept the appeal and modifying the order of the lower appellate Court restore the decree of the first Court declaring that the gift is invalid so far as the plot of 6 bighas 19 biswas is concerned and ordering Mt. Kishni's ejectment therefrom and dismiss his suit as regards the plot of 11 bighas 15 biswas. The parties shall bear their own costs throughout.

R.M./R.K.

Appeal accepted.

(5) [1912] 78 P. R. 1912=14 L. O. 247

## A. I. R. 1919 Lahore 411

CHEVIS AND ABDUL RAOOF, JJ.

*Chandu Lal and another*—Defendants Appellants.

v.

*Mt. Ladli Begam and others*—Plaintiff and Defendant—Respondents.

First Appeal No. 377 of 1914, Decided on 21st January 1919, from decree of Divl. Judge, Delhi, D/ 4th February 1914.

Land Acquisition Act (1894), S. 31 (2) — Award by Collector—Question of apportionment not gone into—Suit for claiming portion is maintainable.

A person claiming a portion of the compensation awarded by the Collector in land acquisition proceedings is entitled to maintain a civil suit to establish his claims, where the question of the apportionment of the compensation money has not been determined by the Collector: 7 C. W. N. 533, Foll; 37 P. R. 1905 and 52 P. R. 1913, Dist. [P 413 C 1, 2]

*Mahomed Shafi, Mahomed Rafi and Rambhaj Datta*—for Appellants.

*Moti Sagar and Moti Lal*—for Respondents.

**Judgment.**—This suit was originally instituted in April 1913. An amended plaint was subsequently presented in June 1913. The suit, as remarked by the lower Court, is somewhat of an unusual character. In order to understand the points in dispute in the case it is necessary to give certain facts disclosing the history of the case. Moti and Hira Singh mortgaged 328 bighas 1 biswa of land situated in Mauza Jar Bagh, Delhi to one Mahomed Ishaq for Rs. 8,000 on 14th May 1896. The latter executed two mortgages without possession in favour of Rai Sahib Girdhari Lal and his son Bala Parshad. The first was dated 12th June 1896 and was for a sum of Rs. 3,200. The other was dated 20th August 1898 and for a sum of Rs. 300. The property mortgaged in both these mortgages was the same which had been mortgaged to Mahomed Ishaq by Moti and Hira Singh, the mortgagors above mentioned. On 19th March 1900 Moti and Hira Singh sold their equity of redemption to Haziqul-Mulk Hakim Abdul Majid for Rs. 4,500. On 7th March 1901 Hakim Abdul Majid obtained a decree for redemption in a suit brought by him against Mahomed Ishaq and Girdhari Lal and others. The decree was made on the condition of payment of Rs. 8,000 with the following details: Rs. 4,140 was made payable to Girdhari Lal and others, and Rs. 3,860 was made payable to Mahomed Ishaq. It was pro-



vided in the decree that the plaintiff was to obtain possession at the end of the then agricultural year and that for the period during which the redemption was deferred interest at one per cent. per mensem was to be given, which was to be deducted from the amount payable to defendant 1. It appears that Mahomed Ishaq sold his right and interest in the property to his wife Mt. Ladli Begam, plaintiff, in this case, on 24th March 1901. Hakim Abdul Majid is stated to have died on 10th July 1901 leaving defendants 1 and 2 in this case as his heirs and legal representatives. Under the terms of the mortgages in favour of Girdhari Lal and others in case of default in payment of interest for a certain period a right was given to the mortgagees to claim possession of the mortgaged property.

Under this condition they sued for possession and obtained a decree on 25th June 1903. Under the decree they obtained actual possession on 9th July 1903. In the original plaint above mentioned the plaintiff claimed Rs. 8,000, the mortgage money, and Rs. 6,958.8.0 as damages from defendants 1 and 2, on the ground that they had failed to pay the sum of Rs. 3,860 to the plaintiff which they had been ordered to pay under the decree and that in consequence of their failing to redeem the mortgaged property and paying the amounts therein mentioned to the plaintiff and to Girdhari Lal and others the plaintiff had suffered damages as stated in the plaint. In the amended plaint the plaintiff prayed for a decree for Rs. 7,732 on account of principal mortgage money, interest and damages as against defendants 1 and 2. As regards defendants 3 and 4 the plaintiff stated that she had discovered that the mortgaged property was acquired by the Government under the Land Acquisition Act in 1913 and that the compensation thereof was assessed at Rs. 11,560.15.2 and that the amount had been received by defendants 1 to 4 according to the details given below:—

	Rs.	a.	p.
Hakim Muhamamd Ahmed Khan, defendant 1	1,789	7	7
Hakim Zafar Ahmad Khan, defendant 2	1,780	7	7
Girdhari Lal, father of defendants 3 and 4	4,000	0	0
Bala Parshad, defendant 3	4,000	0	0

It is stated, by the plaintiff that she

had no knowledge of the acquisition of the land or of the apportionment of the compensation thereof, nor was her consent taken. The appropriation of the whole money by the defendants was illegal. She further stated that defendants 1 and 2 were not entitled to any compensation at all and that defendants 3 and 4 were at the most entitled to receive Rs. 5,240 on the date of taking possession of the land. This sum was made up apparently of two items, namely:

Rs. 4,140, which had been found under the redemption decree above mentioned as due to defendants 3 and 4; and Rs. 1,100, which was the amount of interest alleged and admitted to be due to defendants 3 and 4 for the period during which redemption was deferred. The plaintiff, therefore, claimed the difference between Rs. 8,000, which the defendants had received from the Collector in the land acquisition proceedings, and the sum legally due to them, namely, Rs. 5,240. The plaintiff, therefore, in her amended plaint has come into Court upon two distinct causes: (1) that the defendants 1 and 2 having failed to redeem the mortgaged property under the redemption decree had put the plaintiff to loss; and (2) that defendants 3 and 4 had been given by the Collector a sum larger than was due to them.

Defendants 1 and 2 resisted the suit of the plaintiff upon the ground that there was no obligation on them to redeem the property and that therefore the plaintiff had no cause of action as against them. Defendants 3 and 4 in their written statement raised two main pleas, namely that the plaintiff was bound to have taken steps to seek her remedy in the land acquisition proceedings; in other words, she ought to have had the question of the apportionment of the compensation money determined in those proceedings by applying to have a reference made to the Court of the District Judge on the point. The Collector having decided the question of the apportionment of the compensation it was not open to the plaintiff to come to the civil Court for the decision of the question and that her suit was barred by the special provisions of the Land Acquisition Act. They further pleaded that they were entitled to claim the full amount which was due to them under



the terms of their mortgage deeds. In the alternative they pleaded that they were, at any rate, entitled to claim according to the terms of the decree of redemption passed in 1901 and that the amount calculated with interest would come to a sum much larger than Rupees 8,000 which had been paid to them.

The Court of first instance dismissed the suit as against defendants 1 and 2, finding that the plaintiff had no cause of action as against them. That part of the judgment of the lower Court has become final, as no appeal has been preferred on behalf of the plaintiff as against the dismissal of her claim. As against defendants 3 and 4 the Court of first instance has decreed the suit of the plaintiff. Against that part of the decree the present appeal has been preferred by defendants 3 and 4 and they have impleaded the plaintiff and defendants 1 and 2 as respondents to this appeal. Two main grounds have been argued on their behalf, namely that the suit of the plaintiff was not maintainable having regard to the proceedings under the Land Acquisition Act. It is contended on the authority of two rulings of this Hon'ble Court, namely *Sher Khan v. Shamsher Khan* (1) and *Amolak Shah v. Charan Das* (2), that the question of apportionment being once adjudicated upon by the Collector, it was not open to the plaintiff to claim a second adjudication in the civil Court. We have looked at the award made by the Collector minutely but we have not been able to find any adjudication against the claim of the present plaintiff. On the contrary we find that the name of Mt. Ladli Begam is stated in the award as one of the persons interested in the property acquired by the Government. She is put down in the award as the first mortgagee, which she undoubtedly was as a transferee from her husband. Nothing is stated in the award which may amount to an adjudication that she was not entitled to any portion of the Rs. 8,000. We, therefore, hold that the rulings relied upon on behalf of the appellants have no bearing upon the present case. In our opinion the learned Judge of the Court below has taken a right view of the provisions of the Land Acquisition Act regarding the right of the plaintiff to maintain the present suit

S. 31 (2) of that Act clearly provides for such a case. The plaintiff is entitled to have the question of apportionment determined by the civil Court under that section. The question has been clearly and fully decided in the case of *Srimati Punnabati Dai v. Rajah Pudemund Singh* (3). It is not necessary for us to discuss this question any further. We hold that this plea has no force.

(The rest of the judgment is not necessary for the purposes of the report.—*Ed.*)

R.M./R.K.

*Appeal dismissed.*

[3] [1903] 7 C. W. N. 538.

### A. I. R. 1919 Lahore 413

SHADI LAL AND MARTINEAU, JJ.

*Behari Lal and another* — Defendants — Appellants.

v.

*Amin Chand and another* — Plaintiffs — Respondents.

First Appeal No. 1165 of 1915, Decided on 5th July 1919.

(a) Civil P. C. (1908), O. 32, R. 3 — Minor properly represented in suit by guardian ad litem — No fraud or collusion or negligence on part of guardian—Minor is bound by decree as if he were of full age—Minor, Decree binding.

If a minor is properly represented by a next friend or a guardian for the suit and there is no fraud or collusion on the part of the next friend or guardian or of the opposite party, and his next friend or guardian is not guilty of gross negligence, the minor is as much bound by a decree or order made in a suit or proceeding to which he is a party as if he were of full age, and it can be executed against him or his property, as the case may be, in accordance with *la v.* [P 414 O 1,2]

(b) Civil P. C. (1908), O. 32, R. 3 — Guardian ad litem—Duty of—Amount of care and attention expected on part of guardian is same as reasonable person would devote to his case.

It is not the duty of a guardian ad litem to raise frivolous or untenable defences. The amount of care and attention which the guardian of a minor is expected to bestow upon the case of his ward is the same as a reasonable person would devote to his own case. [P 414 O 2]

(c) Minor—Decree binding—Suit by minor to set aside decree — Minor represented in previous suit by guardian ad litem — Burden is on minor to prove gross negligence on part of guardian in defending suit.

Plaintiff's father executed a mortgage-deed by way of conditional sale in favour of the defendant on 14th December 1836. It was stipulated that the mortgage money would be paid within three years and that, in the event of default, the foreclosure clause would come into operation. No payment having been made, the mortgagee, after making a demand and issuing a notice of foreclosure, brought the usual action for possession and obtained a decree against the minor sons of the mortgagor, who had died before the institution of the suit. The minors now brought the

(1) [1905] 37 P. R. 1905.

(2) [1912] 52 P. R. 1918=17 I. O. 634



present suit to set aside the decree. It appeared that in the previous suit their mother acted as guardian ad litem and resisted it on various grounds :

*Held* : (1) that the onus lay upon the plaintiffs to establish gross negligence on the part of their guardian in defending the previous suit ; (2) that having failed to do so, they could not impugn the decree passed against them. [P 415 C 2]

*Muhammad Shafi*—for Appellants.

*Kishen Chand*—for Respondents.

**Judgment.**—On 14th December 1896 Balu, the father of the plaintiffs, executed a mortgage-deed by way of conditional sale in favour of the defendant Bihari Lal and his father Ram Dial. One of the stipulations in the deed was that the mortgagor had to pay the amount due from him within three years and that in the event of default the foreclosure clause would come into operation. No payment was made within the prescribed period, and the mortgagees, after making a demand and issuing a notice of foreclosure, brought, after the expiry of the year of grace, the usual action for possession of the land, alleging themselves to be the vendees of the property. It appears that the mortgagor Balu had died before the institution of the above-mentioned suit ; and that his sons, who were then minors, were impleaded as defendants with their mother as their guardian ad litem. The mother resisted the suit on various grounds, but the Court after inquiring into all the issues rejected the defence and passed a decree on 28th March 1905 in favour of the quondam mortgagees.

The minors through one Teja as their next friend have brought the present action for setting aside the aforesaid decree, and their claim has been allowed by the District Judge, Sayad Wali Shah. The judgment of the District Judge is a very unsatisfactory document and betrays an utter ignorance of the law applicable to a case of this character. The Judge not only attempts to criticise the conclusions reached in the previous suit as if we were a Court of Appeal from the judgment in that case, but also misstates certain facts and even tries to find in favour of the plaintiffs on one or two matters which were rightly admitted on their behalf and did not consequently constitute the subject-matter of any issue between the parties.

The principle of law is beyond dispute that if a minor is properly represented by a next friend or a guardian for the

suit, and there is no fraud or collusion on the part of the next friend or guardian or of the opposite party, and his next friend or guardian is not guilty of gross negligence, the minor is as much bound by a decree or order made in a suit or proceeding to which he is a party as if he were of full age ; and it can be executed against him or his property, as the case may be, in accordance with law, vide Law relating to Minors by Trevelyan, Edn. 4, pp. 284-85. Now, the plaintiffs do not allege any fraud or collusion on the part of their guardian, and they base their claim upon negligence pure and simple. The case as built up by the District Judge on their behalf is contained in the following extract from his judgment :

“The jawab-i-dawa of the minor's mother, her statement and the issues show that she (guardian of the minors) omitted to raise many objections regarding the conditions of the mortgage-deed, nor did she raise any objection respecting demand, nor yet did she raise any objection as to consideration or necessity, nor yet did she even raise any objection regarding the service of notice.”

The fact that this sentence contains some misstatements is apparent from the perusal of the pleas and issues copied out in the judgment by the District Judge himself from the record of the previous case. We find that the guardian did raise the question of the failure of the mortgagees to make a demand before issuing the notice of foreclosure and that this led to the framing of issue 2. As to the service of notice there does not appear to be any distinct plea, but the matter was clearly embodied in issue 3. On both the questions evidence was led, and the Court found in favour of the plaintiffs. There can be no doubt that the District Judge has indulged in reckless statements, and Mr. Kishen Chand for the plaintiffs frankly admits that he is unable to support the decision in favour of his clients on the strength of these two points. It is true that there was no plea challenging the consideration and necessity for the mortgage, but it must be remembered that it is not the duty of a guardian ad litem to raise frivolous or untenable defence. The amount of care and attention which a guardian of a minor is expected to bestow upon the case of his ward is the same as a reasonable person would devote to his own case. The litigants in a Court of law are not expected to put forward all sorts of absurd pleas which



cannot be sustained, and it is only right that they should confine their attention to matters upon which there is a real and genuine controversy and upon which there is something to be said on their behalf.

Applying this principle to the case before us, we find that the entire consideration for the transaction was paid before the Sub-Registrar, and the guardian was accordingly well advised not to put forward a plea which she would have found exceedingly difficult to establish. As regards necessity, it must be borne in mind that in December 1896 there was a severe famine in the Hissar District, and that many a proprietor owning barani land (and the land in dispute is barani and of a poor quality) stood in need of borrowing money in order to maintain himself and his family. Indeed the mortgage-deed executed by Balu distinctly recites this necessity, and there can be no reasonable doubt as to the correctness of the recital. The clause as to conditional sale was a common feature of the mortgages executed in this district and other neighbouring districts: and the rate of interest, though high, cannot be regarded as unconscionable in view of the nature of the security offered by the debtor, the security referred to above and the stringency of the money market prevailing at that time. As to the rate of interest, reference should be made to the observations of their Lordships of the Privy Council contained in *Lala Balla Mat v. Ahad Shah* (1).

The facts set out in the preceding paragraph do not admit of any reasonable doubt, and the mortgagor's widow, who was assisted by her son-in-law, was apparently fully cognizant of them. In these circumstances her omission to plead the want of necessity and the alleged onerous nature of the terms of the transaction cannot be regarded as gross negligence, such as would justify a Court of law in holding that the previous decree should be inoperative against the minors. We consider that the alienation was for necessity, and it is very doubtful whether Balu, circumstanced as he was, would have got better terms from any other mortgagee. It is unnecessary to refer to the gratuitous remarks made by the District Judge as to the execution of the mortgage by Balu. It

is to be observed that even the next friend of the minors admitted the execution of the deed in the plaint filed by him, and the attempt of the District Judge to impeach the genuineness of the instrument is utterly futile and shows a lack of judicial spirit. The learned vakil for the plaintiffs has not referred to this matter in his arguments, and we do not think that we should waste any more words over it.

For the aforesaid reasons we hold that the plaintiffs, on whom the onus lay, have failed to establish gross negligence on the part of their guardian in defending the previous suit; and they cannot impugn the decree passed against them. We accordingly accept the appeal and dismiss the suit with costs throughout.

R.M./R.K.

*Appeal accepted.*

### A. I. R. 1919 Lahore 415

SCOTT-SMITH AND WILBERFORCE, JJ.

*Jahana and another—Plaintiffs—Appellants.*

v.

*Walli and others—Defendants—Respondents.*

First Appeal No. 1522 of 1915, Decided on 18th February 1919, from decree of Sub-Judge, First Class, Sargodha, D/- 26th February 1915.

(a) Limitation Act (9 of 1908), Art. 120—Suit for declaration of title by person in possession—Time runs from date of attempt to oust.

A suit for declaration of his title to immovable property by a person in possession as proprietor is not barred, if brought within six years from the time when the defendant attempts to oust him from the land, although a right to sue the defendant who had been recorded as owner of the property in the Settlement Record had already accrued and become barred. [P 416 O 1, 2]

(b) Custom (Punjab)—Succession—Rule of chundawand—Burden of proof is on person alleging it.

Ordinarily, under Customary law, sons, whether by the same or different wives, share equally, and therefore where a party alleges that the rule of chundawand governs the succession in any particular case, the burden of proving the custom of chundawand would be on the person who alleges it. [P 416 O 1, 2]

*Duni Chand—for Appellants.*

*Nanak Chand—for Respondents.*

**Judgment.**—The parties to this litigation are, as will appear from the subjoined pedigree-table\* the descendants of Mehra by his two wives, Mt. Bhagbhari and Mt. Ghulam Bibi.

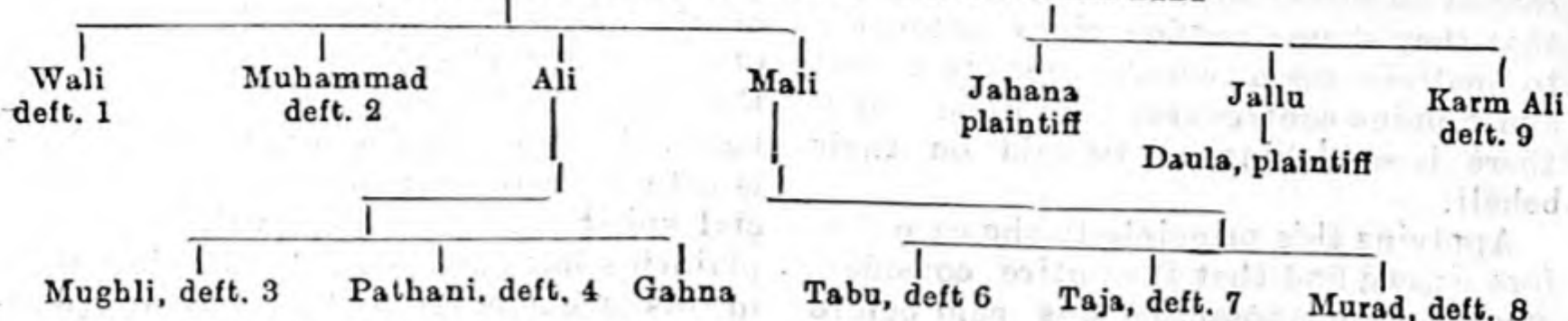
They own land as follows:

(For pedigree table see p. 416).

(1) A. I. R. 1918 P. O. 249=124 P. R. 1918=48 I. O. 1 (P.O.).



Mt. BHAG BHARI=MEHRA=Mt. GHULAM BIBI



(a) 417½ kanals at village Jahanpur, Tahsil Bhera. (b) 846½ kanals of land at village Mari, Tahsil Sargodha. (c) 1,337½ kanals also at village Mari. On the death of Mehra the lands A and B were entered in the names of his seven sons in equal shares. Land C came to the family upon a partition of the shamilat, the date of which is not mentioned. Plaintiffs say that they follow the custom of chundawand and that their share and that of Karm Ali, who is pro forma defendant, is one-half in plots A and B and not three-sevenths as entered in the Revenue Records. In regard to plot C the allegation is that plaintiffs and Karm Ali acquired it by reason of the fact that they alone paid tirni dues in village Mari. The plaintiffs in para. 7 of their plaint stated that on an application for partition of the land made by Wali and Muhammad they came to know of the wrong entry in the papers and therefore, they brought the present suit as regards plots A and B. The partition record has not been sent for, but it appears from the statement of Muhammad, defendant, at p. 62 of the paper-book that an application for partition was filed in Bisakh, i. e., April 1914. The present suit was instituted on 29th May 1914. The lower Court dismissed the suit as to plots A and B holding that it was barred by time and as to plot C holding that plaintiffs had not proved their exclusive proprietary right thereto. The plaintiffs have appealed to this Court and we have heard arguments on their behalf by Mr. Duni Chand, Advocate.

We shall first deal with the question of limitation. The lower Court based its decision on *Akbar Khan v. Turaban* (1). Mr. Duni Chand relies upon the following rulings: *Allah Jilai v. Umrao Hussain* (2), *Hakim Singh v. Waryaman* (3)

and *Khem Singh v. Kesar Singh* (4). The authorities in question appear to support the view that the present suit is not barred by time. In *Hakim Singh v. Waryaman* (3) it was held that a suit for declaration of his title to immovable property by a person in possession as proprietor is not barred, if brought within six years from the time when the defendant attempts to oust him from the land, although a right to sue the defendant who had been recorded as owner of the property in the settlement record had already accrued and become barred. Now, applying this rule to the facts of the present case, it is quite clear that the plaintiff's right to sue for a declaration in regard to the settlement entries accrued many years ago and had become time barred, but a new cause of action accrued to them when the defendants applied for partition and attempted to take advantage of the entry in their favour. The case in *Khem Singh v. Kesar Singh* (4) was very similar to the present one. The facts are as follows:

"In 1882, plaintiffs and defendants were recorded owners of their joint holding in the proportion of three-sevenths and four-sevenths shares, respectively. In 1885-86, for some unknown reason plaintiffs were recorded as owners of one-third. In 1891 one of the cosharers complained against the correctness of the entry but without success. The incorrect entry was repeated in the present settlement. In 1906 defendant applied for partition on the strength of the entry of 1891 and plaintiffs sued to obtain a declaration that they were entitled to three-sevenths share as recorded in 1882. It was held that the plaintiffs' suit was within time and was governed by Art. 120 and not by Art. 96, Lim. Act. 15 of 1877, and that a fresh cause of action accrued to them in 1906."

The case was decided by a Division Bench of this Court which followed *Hakim Singh v. Waryaman* (3) and distinguished *Akbar Khan v. Turaban* (1). We, therefore are of opinion that the plaintiffs' suit for a declaration in regard to plots A and B was not barred by time.

The lower Court has not come to any decision on the merits, namely, whether

(1) [1909] 31 All 9=1 I. C. 557.

(2) A. I. R. 1914 All. 184=24 I. C. 535=36 All. 492.

(3) [1907] 110 P. R. 1937.

(4) [1910] 7 I. C. 528.



plaintiffs are entitled to two-thirds of one-half of plots A and B or only to two-sevenths as recorded in the revenue records. We have therefore examined the evidence on the record for ourselves and proceed to decide the point. The question is whether the parties follow the rule of chandawand or that of pagwand. Now, ordinarily sons, whether by the same or different wives, share equally: see Art. 7 of Rattigan's Digest of Customary law and the onus therefore lies upon the plaintiffs to prove that they follow the rule of chundawand. The question is discussed in the General Code of Tribal Custom in the Shahpur District by Wilson at p. 6. The author says that all the sons take equal shares without regard to the number or tribe of the mothers. At p. 42 will be found the answer of the tribes as to whether sons succeed equally or whether regard is paid to uterine descent. All the tribes replied that no such regard is paid and that all legitimate sons, whether by the same or different mothers take equal shares. In a note at p. 43 the author says many instances were given in which sons by different mothers share equally (pagwand) and the only instances in which the sons shared according to the number of mothers (chundawand) were a few among the Khokhars in which the father made the division in his lifetime and one among the Hindus. The pagwand rule is, he says practically universal throughout the district. Under these circumstances the onus lay very heavily upon the plaintiffs to prove that they followed the custom of chandawand. Counsel refers to the agreement of the proprietors of mauza Jahanpur printed at p. 3 of the paper book. This agreement appears in the settlement papers of 1857. The proprietors agreed that the division of heritage should take place according to the number of wives, and not according to the number of sons. In spite of this not a single instance has been cited from Jahanpur village in which the sons of a proprietor inherited according to the rule in question. The agreement would therefore seem to have never been acted upon.

Counsel has referred to the oral evidence of the plaintiffs' witnesses to the effect that Gondals, to which tribe the parties belong, follow the rule of chandawand. The only instance however

cited was one from the village of Khan Muhammadwala, which is said to be half a mile from Jahanpur. The defendants' witnesses on the other hand say that the rule of inheritance is pagwand. Counsel has also referred to an entry in a former patwari's diary which is printed at p. 56 of the paper-book. The patwari who made this entry has not been produced as a witness and we are therefore unable to regard it as proved or of any weight at all. We consider that the plaintiffs have absolutely failed to discharge the heavy onus which lay upon them. The fact that upon the death of Mehra all his sons were entered as inheriting equally in both the villages is a very strong proof that they follow the custom of pagwand. Added to this is the fact that in the subsequent settlements no application was made to have the entries changed. In regard to plot C the contention, so far as we understand it, is that the plaintiffs and Karm Ali have all along lived in Mauza Mari and cultivated the land there and paid the tirni dues for grazing their cattle on the shamilat, whereas the other defendants have lived in Mauza Jahanpur and have not paid tirni dues in Mauza Mari. It is however not clear whether defendants 1 to 8 have paid tirni in Mauza Mari or not. There is absolutely no documentary evidence on the record to prove that this plot of land was allotted to the plaintiffs and defendant 9 on the partition of the shamilat as stated in para. 8 of the plaint. The fact that it was entered in the names of the descendants of Mehra shows on the contrary that it was allotted to them. Plaintiffs have failed to show that they and defendant 9 are exclusively entitled to this plot of land, nor have they proved that there is any custom by which if they and defendant 9 alone had paid tirni dues, the land would have been theirs by right to the exclusion of defendants 1 to 8. The appeal therefore fails and is dismissed with costs.

R.M./R.K

*Appeal dismissed.*



**A. I. R. 1919 Lahore 418 (1)**

BROADWAY, J.

*Asmatullah*—Defendant—Appellant.

v.

*Majid Khan and others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 472 of 1919, Decided on 30th April 1919, from decree of Dist. Judge, Delhi, D/- 30th December 1918.

(a) Civil P. C. (1908), S. 35 — Question of costs—Second appeal lies.

A second appeal is competent on a question of costs: 12 Cal. 271 and 45 I. C. 948, *Foll.*

[P 418 C 2]

(b) Civil P. C. (1908), S. 100—Appeal decided on technical point — Court expressing opinion on points not necessary to decision of appeal—Second appeal objecting to opinions held not competent.

In deciding an appeal on a technical point the District Judge expressed opinions on various points that had arisen but on which the decision of the appeal in no way depended. The defendants preferred a second appeal objecting to these opinions.

*Held*: that a second appeal was not competent.

[P 418 C 1]

*Moti Sagar*—for Appellant.*Shamair Chand*—for Respondents.

**Judgment.**—The plaintiff respondent instituted this suit against the defendants-appellants claiming certain rents from them. The learned District Judge, on appeal to him dismissed the suit on a technical point which went to the root of the case as it stood. At the same time he expressed his opinion on various other points that had arisen but on which the decision of the appeal in no way depended in view of the decision on the technical point. He also directed the defendants to pay the plaintiff's costs on appeal holding that the defence raised was false.

The defendants-appellants have preferred this appeal complaining of the order as to costs and also objecting to the opinions expressed on the other points in the case. As to these opinions it is clear that no appeal is competent. They are mere expressions of opinion and were not strictly necessary in the circumstances. Mr. Shamair Chand for the respondents contended that no second appeal was competent on the question of costs and he cited *Ma Lon Ma v. Maung Tun U* (1), *Dwarka Nath Missir v. Pralhad Ram Tewari* (2) and *Mozoffar Khan v. Ghulam Muhammad Khan* (3). *Ma Lon Ma v. Maung Tun U* (1) cer-

tainly supports this contention but in *Dwarka Nath Missir v. Pralhad Ram Tewari* (2) the High Court of Calcutta merely declined to interfere and did not hold that the appeal was not competent. In *Mozaffar Khan v. Ghulam Muhammad Khan* (3) the competency of the appeal was not decided. Such an appeal was held to be competent in *Moshingan v. Mozari Sajad* (4) and Shah Din, J., took a similar view in *Fazal Nur v. Muhammad Hassan* (5). The appeal therefore must be regarded as competent.

The order of the learned District Judge appears to me to be somewhat harsh in the circumstances. Both sides appear to have attempted to bolster up their cases with evidence that has been held unreliable and the fairest order would I think have been to leave the parties to bear their own costs. I accordingly accept the appeal and I direct that the parties bear their own costs in this and in the lower appellate Court.

R.M./R.K.

*Appeal accepted.*

(4) [1886] 12 Cal. 271.

(5) [1918] 45 I. C. 948.

**A. I. R. 1919 Lahore 418 (2)**

SCOTT-SMITH, J.

*Sohan Singh*—Accused—Petitioner.

v.

*Emperor*—Opposite Party.

Criminal Revn. No. 293 of 1918, Decided on 12th April 1918, from report of Sess. Judge, Rawalpindi, D/- 25th February 1917.

**Motor Vehicles Act (1914), S. 14—Punjab Motor Vehicles Rules—Rr. 10 and 17—Servant driving car without lights in absence of master—Master is not liable.**

Rules 10 and 17 of the Punjab Motor Vehicle Rules only apply to the driver or to a person using the car at the time it is being driven, and not to an absent owner. The owner of a car therefore is not liable to be fined because in his absence his servant drove his motor-car without lights after lighting-up time. [P 419 C 1]

*Gokal Chand*—for Accused.

**Facts.**—The accused, on conviction by Mr. H. B. Anderson, Cantonment Magistrate, exercising the powers of a Magistrate of the First Class, in the Rawalpindi District, was sentenced by order, dated 27th August 1917, under Rr. 10 and 17 of the rules made in 1915 under the Motor Vehicles Act 8 of 1914, to pay a fine of Rs. 5.

**Report.**—The proceedings were forwarded for revision on the following rounds:

(1) [1912] 15 I. C. 429.

(2) [1912] 13 I. C. 201.

(3) [1915] 62 P. R. 1915=28 I. C. 455.



"Petitioner was not in the car himself at the time the offence is said to have been committed and I fail to understand how he can be held to be criminally responsible for the act of his servant in driving the car in contravention of the rules. It is not, as the Magistrate says, a well recognized principle of law that the master is responsible for the wrongful acts of his servants. It is true that so far as civil liability goes, it is a recognized principle that the master is liable for all tortuous acts of his servant done in the course of his employment and for the master's benefit, but as regards criminal liability the principle is that he only is criminally punishable who immediately does the act or permits it to be done. There are certain exceptions to this principle, but the offence of which the petitioner has been convicted is certainly not one. The owner of the car, as has been said, was not in the car at the time the offence was committed and there is no evidence to show that he permitted the wrongful act complained of to be done.

"It is to be noted also that the date on which the offence was committed is entered in the extract from the Cantonment Magistrate's Summary Register as 8th June 1917, whereas the complaint (vide letter No. 1604-2-5, dated 19th May, from the Brigade Major, Rawalpindi, to the Cantonment Magistrate, Rawalpindi) shows that the offence was committed on 17th May 1917. I am of opinion that the petitioner has been wrongly convicted and sentenced and I would recommend that the sentence and conviction be set aside as illegal, and the fine, if paid, be refunded."

**Order.**—Petitioner has been fined because in his absence his servant drove his motor-car without lights after lighting-up time. As stated by the learned Sessions Judge, the owner of the car has in these circumstances committed no criminal offence. Rr. 10 and 17 obviously only apply to the driver or to a person using the car at the time it is being driven, and not to an absent owner. The conviction of petitioner is hereby set aside and the fine, if paid, will be refunded.

R.M./R.K.

*Petition accepted.***A. I. R. 1919 Lahore 419**SHADI LAL AND WILBERFORCE, JJ.  
*Hargopal*—Plaintiff—Appellant.

v.

*Harish Chandar and another*—Defendants—Respondents.

Second Appeal No. 1971 of 1915, Decided on 22nd July 1918.

Civil P. C. (1908), O. 17, Rr. 2 and 3—Dismissal for default—Procedure under R. 2 is to be followed when both rules applicable.

Where a default takes place within the meaning of both R. 2 and R. 3, O. 17, and there is not enough material on the record to enable the Court to proceed to judgment, the Court should proceed under R. 2. [P 420 C 1]

*Nand Lal*—for Appellant.*Santanam*—for Respondents.

**Judgment.**—The summons of plaintiff's witnesses had been returned unserved for want of correct addresses and on 16th November the first Court directed plaintiff to give correct addresses within three days. It is apparent that these correct addresses were not given as ordered although the exact facts are impossible to verify, the necessary papers having been destroyed. From the grounds of appeal to the District Judge which are silent on this subject and from his decision, there can be no doubt that they were not furnished as ordered. An adjournment was granted for 19th December on which date plaintiff and his pleader failed to appear and the suit was dismissed under R. 3, O. 17. The lower appellate Court has also held that R. 3 is applicable to the case and against this decision the plaintiff has preferred this second appeal.

It is clear to us that a default took place within the meaning of both R. 2 and R. 3, O. 17; and the only question for decision is under which rule the suit should have been dismissed. Although there is a conflict of authority among the High Courts whether R. 2 or 3 should be applied where there is material on the record to enable the Court to pronounce judgment, there is no such conflict where such material does not exist, as was the case in the present suit. The Calcutta High Court judgments published as *Mariannissa v. Ramkalpa Goran* (1), *Kader Khan v. Juggeswar Prasad Singh* (2) and *Enatullah v. Jiban Mohan Roy* (3) are sufficient authorities that where

(1) [1907] 34 Cal. 235.

(2) [1908] 35 Cal. 1023.

(3) A. I. R. 1914 Cal. 360=28 I. O. 769=41 Cal. 956.



there is no sufficient material on the record to enable the Court to proceed to judgment R. 2 should be applied. The same appears to be the view of the only published authority of this Court, *Ram rattan v. Hyat Muhammad* (4). We hold therefore that the suit should have been dismissed under R. 2, O. 17.

We therefore accept the appeal and set aside the decision of the lower appellate Court and remand the case for trial on its merits. As however the plaintiff appears to have been guilty of dilatory tactics so as to defeat the claim of Nand Singh, defendant, we order that plaintiff shall pay the costs incurred by Nand Singh up to date.

R.M./R.K.

*Appeal accepted.*

(4) [1880] 41 P. R. 1880.

### A. I. R. 1919 Lahore 420

SHADI LAL AND MARTINEAU, JJ.

*Sadhu*—Appellant.

v.

*Emperor*—Opposite Party.

Criminal Appeal No. 611 of 1918, Decided on 23rd December 1918, from order of Sess. Judge, Karnal, D/- 17th August 1918.

Penal Code (1860), Ss. 302, 326 and 328 — Dhatara poisoning with intent to commit robbery—Section applicable depends on circumstances of each case.

Where dhatara is administered to a person with fatal results with intent to facilitate the commission of robbery no hard and fast rule can be laid down as to the section of the Penal Code under which the person administering the dhatara should be convicted; the circumstances of each particular case must be taken into consideration. [P 421 C 2]

*C. Bevan Petman*—for the Crown.

**Judgment.**—The appellants Sadhu and Atru are brothers, Chamars by caste belonging to the village of Khatkar Khurd in the Jullundur District. They have been convicted of murdering Prem and his wife Jamna, Chamars of Gohana in the Rohtak District, by poisoning them with dhatara, and sentenced to transportation for life. On the morning of the 19th June last Prem and Jamna with two small children named Phuski (Jamna's daughter by a former husband) and Gugania (Prem's son by a former wife), were found on the road at Jasiya, about half way between Gohana and Rohtak. Prem and Jamna were lying unconscious, and the children, though they were moving about were also not in their senses. They were all taken to

the thana at Rohtak, and from there to the hospital. Prem and Jamna died on the way to the hospital, but the children recovered. The evidence of the Civil Surgeon, who examined the bodies of the deceased, shows that the post mortem appearances indicated that the deaths were due to poison. The Chemical Examiner found dhatara in the deceased persons' stomachs and intestines and also in the excreta of the two children, and there can be no doubt that Prem and Jamna died from dhatara poisoning.

The appellants appear to have been living for some time at Fohana, where they used to sell grass and they lived with Prem and Jamna in a hut belonging to Mai Dhan, as proved by the evidence of the latter and his wife Sama Kaur (P. Ws. 5 and 6) as well as by that of the children, Phuski and Gugania (P. Ws. 1 and 2). A few months before the occurrence Prem had obtained Rs. 200 by giving his daughter Jai Kaur (P. W. 13), in marriage to some one at Balabh, although she was already married to another man (see the evidence of Mai Dhan Sama Kaur and Jai Kaur), and the belief that Prem was possessed of money and valuable property is said to have excited the cupidity of the appellants and to have prompted them to commit the crime on the night of the 18th June when Prem, Jamna, and the children were on their way from Gohana to Balabh. Phuski and Gugania state that they, Prem and Jamna, left Gohana in company with the appellants. They walked a little way and then got into camel carts which were going from Gohana to Rohtak. There were two carts, and three of the party travelled in one cart and three in the other. On the way Prem, Jamna and the children ate some laddus. Gugania says the appellants gave them the laddus, but Phuski is more definite and says that Sadhu gave them. The children did not care for the laddus and ate only a small quantity, giving the rest to Jamna. At Jasiya the carts stopped for a time and the passengers got out. The children are unable to say what happened after that.

The cartmen Akbar Ali and Amin (P. Ws. 3 and 4) also depose to Prem, Jamna, the two children and the appellants having travelled in their carts from a little way beyond Gohana to Jasiya, where the passengers alighted, but know



nothing about the laddus. They go on to say that when it was time to resume the journey they called out to the passengers to get into the carts, but the passengers said that the woman had something the matter with her, so Akbar Ali and Amin went on with the carts leaving Prem, Jamna and the children behind. When they had gone about 3 miles the appellants overtook them, got into one of the carts and went on to Rohtak. They had with them a bag and a bundle which Prem and Jamna had previously been carrying, and explained that they were bringing these for their companions, who would follow in the morning. The appellants deny that they travelled with Prem and Jamna, but they have produced no evidence and there is no reason for disbelieving the statements of the two children and the cartmen. The Sub-Inspector of Police who investigated the case after discovering that the men who had travelled with Prem and his family were residents of Khatkar Khurd, went to that village on the 26th June and found the appellants at their house there.

He searched the house and found in it a number of clothes and other articles, which have been identified as the property of Prem by Phuski, Gugania and Jai Kaur, some being also identified as Prem's by Sama Kaur. Two purses found on Atru have also been identified as belonging to Prem. The appellants say that the articles found are theirs but there is nothing to support their allegations, and we are satisfied that the property belonged to Prem.

The discovery of the deceased persons' property in the appellants' possession, coupled with the evidence as to Prem and Jamna and the two children having travelled in the appellants' company from Gohana and being given by Sadhu some laddus after eating which they got ill, with fatal results in the case of Prem and Jamna, establishes the appellants' guilt beyond doubt. Phuski says that she, Prem, Jamna and Gugania ate nothing but the laddus after leaving Gohana, and we think there can be no doubt that the dhatura must have been in the laddus. Although she says it was only Sadhu who gave them the laddus, we have no doubt that he was acting in concert with Atru as they were travelling together and both decamped with the property

after their victims had been rendered insensible.

The question remains what offence the appellants committed. In *Queen-Empress v. Tulsha* (1) a woman who had administered dhatura to three members of her family, who all recovered, was found guilty of an attempt to murder, but it is not clear how the Court came to that finding as it was held that although the accused knew that she might cause death she had no intention to do so, but intended only to incapacitate temporarily the persons to whom she administered the dhatura in order that she might fly with her lover. In *Emperor v. Gutali* (2) the offence committed was held to be murder because the dhatura had been given in such quantity that the person to whom it was given died in three or four hours. In the present case the deaths occurred after a much longer interval and there is nothing to show how much dhatura was given.

The learned Government Advocate has also cited *Lala v. Emperor* (3), but that case is distinguishable as the learned Judges found that the appellant was an expert in dhatura poisoning and knew well that the poison worked in a most effective and dangerous manner upon his victims. On the other hand, in *Emperor v. Bhagwan Din* (4), where dhatura had been administered to travellers, one of whom died and the trial Court had convicted under S. 304, I. P. C., the High Court on appeal altered the conviction to one under S. 325, though the learned Judges remarked that the case might possibly have come under S. 326. We are of opinion that no hard and fast rule can be laid down as to the section of the Indian Penal Code applicable, and that the circumstances of the particular case must be taken into consideration. In *Pira v. Empress* (5) Plowden, J., remarked on p. 71:

"The use of dhatura, on the other hand, in order to facilitate the commission of robbery, does not per se and necessarily import the contemplation of the victim's death as a means towards, or as incidental to, the main end of robbery. Judicial experience shows that numerous robberies are committed with the aid of dhatura without fatal results."

(1) [1898] 20 All. 149.

(2) [1909] 81 All. 148=1 I. O. 765.

(3) [1911] 9 I. O. 731.

(4) [1908] 30 All. 568.

(5) [1881] 28 P. R. 1881 Cr.



In the present case we think that it has not been shown that the appellants administered the dhatura with such intent or knowledge as would make them guilty of murder. Their offence would fall either under S. 326 or under S. 328, I. P. C., and we think they should be convicted of the graver of those two offences. We accept the appeal only to the extent of altering the conviction in the case of each appellant to one for voluntarily causing grievous hurt by means of poison, under S. 326, I. P. C. We see no reason for reducing the sentences, which are accordingly maintained.

R.M./R.K. *Appeal partly accepted.*

### A. I. R. 1919 Lahore 422

CHEVIS, J.

*Asa Nand*—Auction-purchaser—Petitioner.

v.

*Jhangi Ram and others*—Judgment-debtors—Opposite Parties.

Civil Revn. Petn. No. 10 of 1919, Decided on 3rd January 1919, from order of Dist. Judge, Multan, D/- 8th January 1917.

(a) Civil P. C. (1908), S. 104 (2) and O. 43, R. 1 (4)—Application to set aside sale in execution of decree—Order of remand by appellate Court—Second appeal is not competent.

Where in an appeal from an order setting aside or refusing to set aside an execution sale the appellate Court makes an order of remand, the latter order is final under S. 104 (2), Civil P. C., and no second appeal lies against it.

[P 422 C 2]

(b) Limitation Act (1908) S. 5 and Art. 166—S. 5 does not apply to application to set aside execution sale.

The provisions of S. 5, Lim. Act, cannot be applied for extending the period of 30 days provided by Art. 166, Sch. 1 of the Act for making an application to set aside an execution sale.

[P 422 C 2]

(c) Limitation Act (1908), S. 18—Fraud—Proof of—Act of fraud committed in some other connection is immaterial.

In order to avail himself of the benefit of S. 18, Lim. Act, a party must show that he has by means of fraud been kept from the knowledge of his right to institute a suit or make an application. An act of fraud committed in some other connection is immaterial.

[P 422 C 2]

*Tek Chand and Mukand Lal Puri*—for Petitioner.

*Nanak Chand*—for Opposite Parties.

**Judgment.**—In execution of a decree certain property belonging to the judgment-debtor, Jhangi Ram, was sold by auction on 25th August 1916. Jhangi Ram lodged certain objections on 14th

October 1917; the Senior Subordinate Judge dismissed them on the score of limitation. Jhangi Ram appealed to the District Judge, stating in his grounds of appeal that he had not filed his objections earlier owing to ill-health. He went on to repeat his objections and alleged that by collusion his land had been sold too cheap. The learned District Judge went into the merits of the case and held that there was fraud in the sale proceedings, and accepting the appeal returned the case to the lower Court for disposal according to law. I do not understand why the District Judge, after finding that the sale proceedings were vitiated by fraud, did not set aside the sale instead of returning the case to the lower Court. The auction-purchaser appeals to this Court. For the judgment-debtor the objection is raised that no appeal lies, the order of the District Judge being final under S. 104 (2), Civil P. C. For appellant it is urged that appeal lies under O. 43, R. 1 (a). But if the District Judge, instead of remanding the case, had passed an order disposing of the case, no appeal would have lain from his decision, and so no appeal can lie from the order of remand. I hold therefore that no appeal lies in this case, and the appeal, as appeal, is dismissed. But appellant's counsel asks me to interfere on revision; I certainly have the power to interfere, and I think I should do so, for the simple reason that the real point regarding limitation has not been considered by the District Judge at all. Had he really considered the point I would not have interfered with his decision, right or wrong.

Under Art. 166, Sch. 1, Lim. Act, the judgment-debtor had 30 days from the date of the sale within which to apply for setting aside the sale. This is not such an application that any extension of time can be allowed under S. 5 of the same Act. The only section which can help the judgment-debtor seems to be S. 18, and this apparently is the section which the District Judge has had in mind. But in order to avail himself of the benefit of this section the judgment-debtor must show that he was by fraud kept from the knowledge of his right to apply for the sale to be set aside. There may have been all sorts of frauds committed during the sale but unless the judgment-debtor can prove such fraud as



kept him from knowledge of his right to apply for the setting aside of the sale, S. 18 will not help him. This distinction the learned District Judge seems entirely to have overlooked. He does not find any such fraud as kept the judgment-debtor from knowledge of his right to apply, and further the judgment-debtor never alleged any such fraud, either in the first Court or in his grounds of appeal to the District Judge; on the contrary, in his grounds of appeal he merely alleges ill-health as the cause of the delay in his application to the first Court. His counsel, too, in this Court does not attempt to point out any such fraud. So S. 18 is of no avail, and it follows that the order of the first Court was right and must be restored. I note that the judgment of the District Judge also contains a statement that Art. 166 does not apply, "because the Court could sell the land through the Collector." Whether this is merely the recital of an argument raised on behalf of the judgment-debtor or a finding of the District Judge is not clear. Taking it to be a finding, all I can say is that no authority in support of such a finding and no reasons for such a finding are given or cited, and that the judgment-debtor's counsel has said nothing in support of it. The appeal, as appeal, is dismissed, but on the revision side, I set aside the District Judge's order and restore that of the first Court. I pass no order as to costs, as I suspect that the auction-purchaser has acquired the property at a low figure.

R.M./R.K.

*Petition allowed.***A. I. R. 1919 Lahore 423**

SCOTT-SMITH AND MARTINEAU, JJ.

*Jagat Singh and others*—Plaintiffs—Appellants.

v.

*Partab Singh and others*—Defendants and Plaintiffs—Respondents.

Second Appeal No. 2098 of 1915, Decided on 13th May 1919, from decree of Dist. Judge, Ferozepore, D/- 10th June 1915.

**Custom (Punjab)—Succession — Sister is heir under Customary Law—Wajibularz—Entries in—Proprietor dying lawaris—Person dying leaving sister does not die lawaris.**

A sister is an heir under the Customary Law, in the absence of collaterals, proprietors of the Thulla, in which the land is situated, do not exclude the sister of the last male owner. An entry in the wajibularz to the effect that if a

man dies lawaris, his land goes to the proprietors of his Thulla, or patti or village, does not mean that if a proprietor who dies leaving a sister, can be considered as having died lawaris.

[P 424 C 1, 2]

*Mukand Lal Puri*—for Appellants.*Glulam Rasul for Beni Parshad Khosla*—for Respondents.**Scott-Smith, J.**—The subjoined pedigree-table is necessary for the proper understanding of the facts of the present case.

BUDHU=MT. NANDI.

Mt. Jai Kaur died, 1910=Partab Singh.

Kapur Singh.

Mt. Bholi

The land in suit belonged to Budhu who died some 13 years before suit. After his death the land was mutated in favour of his widow Mt. Nandi, who made a gift of it to her daughter Mt. Jai Kaur by deed dated 15th March 1909, and in pursuance of that gift the land was mutated in her favour on 21st August 1909. On Mt. Jai Kaur's death the land was mutated in favour of her son Kapur Singh, on 28th November 1910. After his death the land was again mutated in favour of Mt. Nandi. After this Partab Singh and Mt. Bholi, the present defendants-respondents sued Mt. Nandi for possession of the land in suit and, upon Mt. Nandi admitting the claim, a decree for possession was passed against her. The plaintiffs, who are the proprietors of the Thulla in which the land is situated, brought the present suit to obtain a declaration that the alienation of the land in favour of Partab Singh and Mt. Bholi should not affect their reversionary rights after the death of Mt. Nandi. In their plaint they stated of that the land was gifted to the father of Budhu by their ancestors and that therefore it would revert to them according to custom, as Budhu had no heir who could succeed to it. The learned District Judge, reversing the decree of the first Court, held that the plaintiffs had not proved they had a right to exclude daughters or the issue of daughters, and dismissed their suit. He has however granted a certificate as to the existence of custom, and the plaintiffs have filed a second appeal in this Court.

The learned District Judge has regarded Mt. Bholi as the daughter's daugh-



ter of the last male owner Budhu, but we find that Kapur Singh actually succeeded Mt. Jai Kaur, and Mt. Bholi is the sister of Kapur Singh. Under these circumstances we think that Mt. Bholi should be considered as the sister of the last male owner; and the question is really whether in the absence of collaterals, the plaintiffs, who are the proprietors of the Thulla in which the land is situated exclude the sister. The plaintiffs rely upon an entry in the *wajibularz* to the effect that if a man dies *lawaris*, then his land goes to the proprietors of his Thulla or Patti or village. It appears to us *prima facie* doubtful if a proprietor who dies leaving a sister can be considered as having died *lawaris*. In Art. 24 of Rattigan's Digest it is stated that sisters are usually excluded as well as their issue. But we understand this to mean that they are usually excluded by collaterals whether these be near or distant. The exceptions to Art. 24 show that in many cases sisters have been held entitled to exclude collaterals in the fifth, sixth and seventh degrees and in some cases they have been held to exclude even nearer reversioners than these. We are not aware of any reported case of the Chief Court where it has been held that a sister is not an heir under the Customary Law. In *Badhawa v. Dewa Singh* (1) it was held that the land of a sonless man devolved upon the male descendants in the male line only of a common ancestor to the exclusion of females and their issue. In that case the proprietors of the village were preferred to the uncle's daughter's son of the last male representative of the owner to whom the land in suit had originally been gifted by one of the village proprietors.

In the present case the proprietors of the Thulla are of many different tribes and on that account the learned District Judge was of opinion that the extreme agnatic theory advanced in this ruling could not apply to the present case. In more recent rulings of the Chief Court it has been held that the gifted land does not revert to the collaterals of the donor until all the descendants of the donee, whether in the male or female line, have died. In accordance with these rulings if the land was really gifted to Budhu by the ancestors of some of

the present plaintiffs, it would not according to these authorities revert to them in the presence of Mt. Bholi, the female descendant of Budhu. There is however in the present case no proof that the land was gifted to Budhu or his ancestors and Mt. Bholi can hardly be in a worse position than she would have been in, had it been so gifted. In *Waryama v. Hiranand* (2) it was held that in accordance with the recognized principles of Customary Law, direct descendants of a daughter and daughter's son of a deceased proprietor's ancestor were entitled in the absence of all male collaterals to succeed to the estate of the latter in preference to a heterogeneous proprietary body of a different *got*. The only difference in the facts of that case and the present one is that in the present case the plaintiff (defendant) is the daughter's daughter of a deceased proprietor, whereas in the former the plaintiff was the daughter's grandson of the proprietor, *Mt. Budhi v. Mt. Mihran* (3) which is referred to by the lower appellate Court is hardly in point, because in that case the parties were Mahomedan Rajputs of Hoshiarpur (an endogamous tribe) and the daughters had succeeded to their father's land excluding his collaterals, and it was held that their daughters were entitled to succeed to their mother's estate in the absence of direct male heirs.

In our opinion, having regard to the fact that a sister's rights have been recognized in many instances under the Customary Law of the Punjab, it cannot be said that a sister is not an heir. Therefore we hold that the clause in the *wajibularz* which refers to proprietors dying *lawaries* does not apply to the case of a proprietor who dies leaving a sister. The Thulladars are thus not entitled to exclude the sister, and we dismiss the appeal with costs.

As Mt. Nandi died during the pendency of the appeal we have allowed the plaintiffs-appellants to amend their plaint so as to ask for possession of the land in suit

R.M./R.K.

*Appeal dismissed.*

(2) [1908] 63 P. R. 1903.

(3) [1910] 5 P. R. 1910=5 I. C. 247.

(1) [1893] 141 P. R. 1893.



## A. I. R. 1919 Lahore 425

SCOTT-SMITH AND MARTINEAU, JJ.

*Devi Das and another* — Plaintiffs—  
Appellants.

v.

*Mohamad and others* — Defendants —  
Respondents.

Second Appeal No. 1003 of 1915, Decided on 6th May 1919, from decree of Dist. Judge, Lyallpur, D/- 13th January 1915.

(a) Civil P. C. (1903), O. 22, R. 9—Death of some respondents—Failure to bring legal representatives—Appeal abated as against deceased respondents only—Appellant being grossly negligent abatement was not set aside.

Where during the pendency of appeal, some of the chief respondents died and no application was made to bring their legal representatives within statutory period, it was found that though admittedly appellant lived in a distant, but he owned land in the village where the respondents resided and as such must have occasion to go there frequently to realise rent.

*Held:* that the appeal abated against the deceased respondents only and not against others and that there was no sufficient reason to set aside the abatement, very gross negligence being apparent on the part of appellant. [P 425 C 2]

(b) Limitation Act (1908), Art. 120—Declaration of title—Right to share in shamilat land—Cause of action when arises illustrated.

Where a land has all along been recorded in the revenue record as shamilat deh and in spite of contentions raised by some persons at the time of settlement that the land was their exclusive property, it was recorded as shamilat deh, mere note of existence of dispute in the settlement record was held not sufficient for an acquisition of exclusive title by reason of adverse possession. It was for the contending parties, if they were dissatisfied with the entry, to bring a suit to establish their right which they claimed. That the continuance of entry leads to inference that claim to exclusive ownership was given up and that co-sharers in the shamilat deh are entitled to hold possession until partition and that cause of action accrued when their right to share in the land was denied at the time when they applied for partition. [P 425 C 1]

*Ram Lal for Bahadur Chand*—for Appellants.

*Taj-ud-din*—for Respondents.

**Scott-Smith, J.**—Some of the Chief defendants respondents have died and applications to have their representatives brought upon the record have not been made counsel for respondents says that Nos. 5, 6, 8 and 11 have died more than six months ago: Allahyar No. 5 on 18th October 1915, Murad No. 6 on 13th March 1916, Murad No. 8 on 12th December 1916, Chiragh No. 11, on 24th February 1913(?) and that the appeal has therefore abated. Mr. Ram Lal admits that they died before 20th November 1918 but says

he has been unable to get particulars as to dates of death. He should put in an application supported by affidavit, and respondents, if so advised, can put in a cross affidavit. Fresh date early.

**Order**—(Dated 5th May 1919.)—Appellants' counsel is unable to give the actual dates of death of the respondents mentioned in the order of 3rd February last. We therefore take the dates therein given as correct. The appeal abates against those persons and we see no sufficient reason to set aside the abatement, very gross negligence being apparent on the part of the appellants. The latter no doubt live in a distant village, but they admittedly own land in Umrana Shumali where the chief defendants reside and must have occasion to go there frequently to realise rent. The appeal does not abate as against the other chief respondents who are Muhammad No. 1, Fateh Muhammad No. 2, Saleha No. 3, Barkhurdar No. 4, Dad No. 7, Nama No. 9, and Muhammad, son of Sukha, No. 10, and Waryama No. 12. Mr. Taj-ud-Din appears for all these except Nama, Muhammad son of Sukha and Waryama. These have been served, and we proceed to have (hear) the appeal *ex parte* against them. The other respondents are formal and not necessary parties.

**Judgment.**—This is a second appeal by the plaintiffs from the order of the lower appellate Court dismissing their suit for a declaration to the effect that certain land in the village of Umrana Shumali is shamilat and that they are entitled to get a share of the same in proportion to *hewat*. The contesting defendants-respondents 1-12 contended that the land was their exclusive property and was not part of the shamilat deh. The first Court gave the plaintiffs a decree, but the lower appellate Court reversed the decision of the lower Court and dismissed the plaintiffs' suit, holding that it was barred by time under Art. 120, Lim. Act. The land has all along been entered in the revenue record as shamilat deh, but it appears that at the Settlement of 1880 the predecessors of the present contesting defendants said that it was not shamilat deh but belonged exclusively to them. Some of the other proprietors contended that the land was shamilat deh. The existence of dispute was noted in the settlement record, but the land was recorded as shamilat deh. In the following settle-



ment also it was so recorded but at that time there was no mention of any dispute as regards ownership. The chief defendants sank a well in the land about the year 1884, and on different occasions they have mortgaged part of it. In 1887 they brought a suit against certain inhabitants of a neighbouring village who had encroached upon part of the land, but the present plaintiffs were no party to this suit.

The lower appellate Court states that the only occasion when the plaintiffs' rights were actually denied by the defendants was at the Settlement of 1880. All the other acts attributed to the defendants are not inconsistent with the plaintiffs' right as co-sharers in the land. It held that the defendants denied the plaintiffs' title in 1880 and that time began to run from that date. The present cause of action arose on the plaintiffs' making an application for partition of shamilat deh, the defendants at that time setting up their own title to the land in dispute. It appears to us clear that the defendants have not proved that they acquired an exclusive title to the land by reason of adverse possession. No doubt they claimed exclusive ownership in 1880, but their claim was not admitted by the Settlement Officer and the inference appears to be that they gave it up. The plaintiffs made no effort to oust the defendants at that time, but there was no necessity for them to do so because defendants as cosharers in the shamilat deh were entitled to hold possession until partition. The fact that since 1880 the land has continued to be recorded as shamilat deh leads to the inference that the defendants did not press their claim to exclusive ownership. There was no necessity for the plaintiffs to bring a suit for declaration as upon a dispute being raised in 1880 the land continued to be shown as shamilat deh in accordance with their allegation.

If the defendants were dissatisfied with that entry they should have brought a suit to establish the right which they claimed. In our opinion the cause of action accrued to the plaintiffs when their right to share in the land was denied at the time when they applied for partition. Their suit is therefore within time. We have already held that the plaintiffs' suit has abated as regards the shares of Allahyar, defendant 5, Murad,

son of Fateh Mohammad, defendant 6, Murad, son of Sukha, defendant 8, and Chiragh defendant, 11. According to ancestral shares of these four persons amount to 23/96ths of the land in suit. The plaintiffs' suit can continue as regards the remaining 67/96ths. We accept the appeal and setting aside the order of the lower appellate Court remand the case thereto under O. 41, R. 23, Civil P. C., for a decision on the merits. As the plaintiffs have been so careless as not to bring the legal representatives of the deceased defendants on the record, we make no order as to refund of stamp duty. Other costs shall be costs in the cause.

R.M./R K.

*Case remanded.*

## A. I. R. 1919 Lahore 426

LEROSSIGNOL, J.

*Udmi—Defendant—Appellant.*

v.

*Ram Gopal and others—Plaintiff and Defendants—Respondents.*

Second Appeal No. 1491 of 1918, Decided on 26th November 1918, from decree of Dist. Judge, Karnal, D/. 28th February 1918.

**Punjab Pre-emption Act (1 of 1913), S. 30**—Sale by some owners, ignoring rights of others and without joining them—Land free of crops—Vendors stating to patwari that vendee was put in possession—Pre-emption—Limitation runs from date of sale.

The vendors sold certain land owned by them and their nephew who was a minor ignoring his right and without joining him in the sale. The land being free of crop, the vendors stated to the patwari that they had placed the vendee in possession:

*Held:* that under the circumstances, it must be held that the vendee took possession of the land on the date of the sale and that limitation began to run from that date under S. 30, Punjab Pre-emption Act. [F 426 C 2, P 427 C 1]

*Nand Lal—for Appellant.**Manohar Lal—for Respondents.*

**Judgment.**—The only question here is whether this suit to pre-empt was within time. At the time of the sale which was oral, the unmortgaged portion of the land sold was free of crop and the vendors, reporting the sale to the patwari stated that they had placed vendee in possession. That statement was sufficient to transfer the possession. But the District Judge holds that the vendors were not in exclusive possession inasmuch as one Bhartu was in possession with them and he did not join in the sale. Now Bhartu is a minor nephew of the vendors and his interest has been ignored.



Had the vendors sold or purported to sell their shares in the field their possession could not be said to be exclusive, but they treated the field as their sole property and they were certainly in actual physical possession of it. In my opinion the vendee took physical possession of this portion of the land sold on 23rd February 1916, and the suit was accordingly time barred. The appeal is accepted and the suit dismissed with costs throughout.

R.M./R.K.

*Appeal accepted.***A. I. R. 1919 Lahore 427**

SHADI LAL AND MARTINEAU, JJ.

*Mt. Prabhi and others*—Defendants—Appellants.

v.

*Hamira and others*—Plaintiffs and Defendants—Respondents.

Second Appeal No. 72 of 1916, Decided on 24th May 1919, from decree of Dist. Judge, Hoshiarpur, D/ 4th October 1915.

(a) Pre-emption—Joint vendees—Proprietor vendee joining with himself non-proprietors of village in sale—Suit for pre-emption by other proprietors is tenable even against vendee proprietor's share.

Where a proprietor vendee, joins with himself non-proprietors of the village in the purchase, he is in no better position than that held by the latter and he cannot even resist the claim in a suit for pre-emption by other proprietors even in regard to his own share, the sale being indivisible, where the deed does not specify the amounts to be paid by the several vendees.

[P 427 O 2]

(b) Transfer of Property Act (1882), S. 52—Proprietor vendee joining with himself non proprietors—Re-sale by non-proprietors to proprietor after suit for pre-emption by other proprietors—Doctrine of *lis pendens* applies, preemption.

Where a proprietor vendee, has joined with himself non-proprietors in the purchase, the rule of *lis pendens* applies to the re-sale by the non-proprietors to a proprietor after the institution of suit for pre-emption by other proprietors, notwithstanding the fact that re-sale took place before summonses were served upon the vendees.

[P 427 O 2]

*Bahadur Chand for Fakir Chand and Amir Chand for Nanak Chand*—for Appellants.

*Nand Lal*—for Respondents.

Martineau, J.—Melo, defendant 1, sold land at Passewal to Indar, Nihala, Kanshi Ram and Achhru Ram, defendants 2 to 5, for Rs. 1,500 on 5th June 1914. Of the four vendees Kanshi Ram and Achhru Ram are land-owners in Passewal, but the other two are not. Plaintiffs, who are land-owners

in that village, sue for pre-emption, and the Courts below have concurred in giving them a decree subject to the payment of Rs. 1,500. The defendants have appealed to this Court. The lower appellate Court, referring to *Rukan Din v. Ilam Din* (1), *Achhru v. Labhu* (2) and *Maghi v. Narain* (3) has held that the vendee Kanshi Ram having joined with himself two non-proprietors of the village in the purchase is in no better position than that held by the latter, and cannot resist the claim even in regard to his own share, the sale being indivisible as the deed does not specify the amounts to be paid by the several vendees. The lower appellate Court's decision on this point is correct and is, in fact, not attacked in the grounds of appeal. The contention on behalf of the appellants is that the vendees Indar and Nihala resold their shares to proprietors in the village and that therefore plaintiffs are not entitled to a decree. This contention is not tenable. The sale by Indar to Mt. Prabhi took place on 10th July 1914, after the institution of the suit. The fact that it took place before summonses were served on the defendants is immaterial, the decisions of Courts in India as to a suit not being contentious until a summons is served on the opposite party having been overruled by the Privy Council in *Faiyaz Husain Khan v. Prag Narain* (4). The rule of *lis pendens* therefore applies, and the sale by Indar of his rights after the institution of the suit cannot affect the plaintiffs' claim. The sale by Nihala which is alleged to have been an oral one has not even been proved.

The plaintiffs are therefore entitled to a decree for pre-emption, but we think the appeal should succeed in regard to the third ground relating to costs. Seeing that the plaintiffs disputed the price both in the first Court and in the lower appellate Court, in which they filed cross-objections and that the findings of both the Courts on this point were against them, we think they should not be allowed costs. We accept the appeal to the extent only of directing that the parties shall bear their own costs

(1) [1900] 100 P. R. 1900.

(2) [1907] 48 P. R. 1907.

(3) A. I. R. 1914 Lah. 128=6 P. R. 1914=20 I. C. 31.

(4) [1907] 29 All. 339=34 I. A. 102=10 O. O. 314 (P.O.).



throughout. As the lower appellate Court's decree provided that three-fourths of the plaintiffs' costs in the first Court should be deducted from the amount to be paid to the vendees, we allow the plaintiffs one month's time from this date for payment of the amount so deducted.

R.M./R.K. *Order accordingly.*

### A. I. R. 1919 Lahore 428

SHADI LAL AND DUNDAS, JJ.

*Thakur Das and another*—Plaintiffs—Appellants.

v.

*Janardhan and another*—Defendants—Respondents.

Second Appeal No. 1579 of 1916, Decided on 24th July 1919, from decree of Dist. Judge, Karnal, D/- 6th March 1916.

(a) Accounts—Suit for—Plaintiff withholding accounts cannot ask to take account.

The new penalty to be imposed upon a person who withholds the accounts is that every presumption is made against him. Plaintiff who has got the account books with him cannot ask a Court to take accounts whilst he withholds the evidence in his power. [P 428 C 2]

(b) Evidence Act (1872), S. 65—Secondary evidence.

Where the loss of account books has not been proved, secondary evidence of their contents is not admissible. [P 428 C 2]

*Moti Sagar, Rup Ram and Shamair Chand*—for Appellants.

*Nand Lal*—for Respondents.

**Dundas, J.**—The plaintiffs Thakur Das and Dal Chand, together with Gulab Singh and Dalip Singh, deceased the father of the defendants, were partners in an iron merchant shop at Cawnpore. Gulab Singh died in August 1904 and Dalip Singh died on 15th November 1909. At that time it would appear that nearly Rs. 5,500 was deposited in the People's Bank, and goods worth about about Rs. 9,000 were forthcoming in the shop. The plaintiffs now sue the minor sons of the deceased partners Gulab Singh and Dalip Singh for an account and for Rs. 3,200 alleged to be the balance due to them of the principal sum of Rs. 4,600 invested by them in the partnership business. The defendants denied all knowledge of the account and asserted that the plaintiffs themselves had managed the business after the death of Dalip Singh and Gulab Singh, that they, the plaintiffs, were in possession of the accounts and had apparently misap-

propriated the proceeds of the business. The first Court came to the conclusion that the shares in the partnership were plaintiffs' 1/3rd and defendants' 2/3rds; that the partnership was dissolved on 15th November 1909; that the business was carried on after that date by the plaintiffs themselves; that the plaintiffs through their agents Moti Ram and Nawal Kishore kept the accounts and that the accounts were in the plaintiffs' possession although they had refused to produce them. The Court held that the plaintiffs were not entitled to claim accounts from the defendants and had utterly failed to prove that the defendants received from the partnership business anything beyond the amount which they have themselves acknowledged.

The plaintiffs appealed to the lower appellate Court which concurred with the first Court in the findings of facts especially in the finding that the plaintiffs had suppressed the accounts. An appeal has now been filed in this Court; and it has been urged that even if the account books are not forthcoming, secondary evidence could be produced and should have been admitted in the first Court. It has also been urged that the lower appellate Court has come to no definite findings. There seem however to be three findings of fact against the appellants. First of all the books are found to have been in the plaintiff's possession up to 1911; and we cannot go behind this finding. The loss of the books has not been proved and secondary evidence of their contents is not admissible. Secondly, there is a definite finding that Moti Ram and Nawal Kishore were working for the plaintiffs as their agents.

And thirdly that the minors had nothing to do with the business after the death of Dalip Singh. As a matter of law it may be the case that the only penalty incurred by a partner who withholds the accounts is that every presumption is made against him but there is an authority *Upendra Kishore Rai Choudhury v. Ramtara Debya Chaudhurani* (1), that a plaintiff who has the account with him can not ask a Court to take accounts whilst he withholds the evidence in his power. On the findings of fact that decision is directly in point. As a matter of fact the plaintiffs have no case from any point of view. It is

(1) [1909] 4 I. O. 542.



admitted that they had their share of the cash. It has been found that the goods of the shop were in the possession of their agents. It has not been shown that the defendants have had more than their share and no account books are in the possession of the defendants nor is there any further account necessary.

The appeal is therefore dismissed with costs.

R.M./R.K. *Appeal dismissed.*

### A. I. R. 1919 Lahore 429

JOHNSTONE, C. J.

*Mohkam Chand* — Decree-holder—Appellant.

v.

*Ganga Ram and others* — Judgment-debtors—Respondents.

First Appeal No. 3278 of 1915. Decided on 12th July 1915, from order of Senior Sub-Judge, Rawalpindi, D/- 18th August 1915.

(a) Civil P. C. (1908), O. 21, R. 16—Person competent to execute decree is original decree-holder or his transferee.

The only person who can execute a decree is the original decree-holder or his transferee, vide S. 49 and O. 21, R. 46. [P 429 C 2]

(b) Civil P. C. (1908), O. 21, R. 16—Applicability—Transferee of portion of decree cannot apply for execution—Transfer of portion of decree is valid.

Rule 16, O. 21 applies only where the whole of a decree has been transferred, or where the whole interest of any decree-holder out of several has been transferred, and does not give power to apply for execution to a transferee of a portion of any one individual decree-holder's rights. [P 429 C 2]

Although portions of a decree can be legally transferred, the decree must be executed as a whole: 17 Cal. 341 and 33 Mad. 80, *Ref.*

[P 430 C 1]

(c) Civil P. C. (1908), O. 21, R. 15—O. 21, R. 15 applies to case of joint decree-holders only.

Order 21, R. 15, Civil P. C., only applies to a case where the decree itself makes a number of persons joint decree-holders and has no application to the case of a transferee of a portion of a decree. [P 430 C 1]

*Govind Das*—for Appellant.

*Sewa Ram Singh and Michael*—for Respondents.

**Judgment.**—The decree, execution of which is in question in this case, was passed by the Chief Court on 18th November 1898. On 28th November 1899 the decree-holder Dholan Das sold part of his decree for the sum of Rupees 1,100 out of Rs. 24,339-1-0 to Mohkam Chand, the present appellant, but Dholan Das continued executing not, as the lower Court says, his portion of the

decree, but apparently the decree as a whole; that is to say, he never intimated that he had parted with any portion of the decree. Mohkam Chand never came into Court at all apparently until 15th January 1907, when he made an application for execution of the portion of the decree sold to him by means of the arrest of the judgment-debtor. Notice of this application was sent to Dholan Das and the judgment-debtors, and on 13th December 1907 the Court recorded an order recognising Mohkam Chand as a part decree-holder; but no direct action appears to have been taken upon his petition aforesaid. On 16th April 1913, Dholan Das having declared himself satisfied, the decree was consigned to the record room as fully executed. In those proceedings no mention was made apparently of Mohkam Chand at all, and everybody seems to have thought that the decree had been finally disposed of. But on 14th December 1914 Mohkam Chand again applied for execution so far as his portion of the decree was concerned, and upon this the order was passed, which is now under appeal. The lower Court has held that limitation began to run against Mohkam Chand from the date of the transfer of the decree to him, this being the date from which he was entitled to apply for execution. Evidently the lower Court had Art. 181 in its mind. At the same time however the lower Court cites O. 21, R. 16, Civil P. C., which really does not apply at all.

That rule, in my opinion, only applies when the whole of a decree has been transferred, or when the whole interest of any decree-holder out of several has been transferred; and it does not give power to apply for execution of decree to a transferee of a small portion of any one individual decree-holder's rights. I cannot believe that the legislature could possibly have contemplated such a thing as that, for it might result in a decree-holder dividing up his decree among 100 different persons and letting each one of them harass the judgment-debtor. It seems to me that under the law, as we have it now, the only persons who can execute a decree are the original decree-holder or the transferee, vide S. 49, Civil P. C., and O. 21, R. 16 aforesaid. It is therefore extremely doubtful whether Mohkam Chand has any power at all to apply for execution. No doubt in



such rulings as *Kishore Chand Bhakat v. Gisborne & Co.* (1) and *Venkat-ramaniah v. Venkatachinnulu* (2) it has been laid down that portions of a decree can be legally transferred, but I understand that even in those rulings, and certainly in other rulings that might be quoted, it has been laid down that the decree must be executed as a whole. Here we find Dholan Das executing the decree as a whole, with Mohkam Chand standing by and contenting himself with asking for pro rata distribution of assets, and Dholan Das finally accepting a sum of money from the judgment-debtor and putting in a receipt to the effect that the decree has been wholly satisfied. In these circumstances it is more than doubtful whether Mohkam Chand has not by his conduct estopped himself from claiming anything further from the judgment-debtors at all events. If he has been unfairly treated by Dholan Das, he may or may not have some remedy against him.

To return to the question of limitation decided by the lower Court. It seems to me from the lengthy arguments put forward by Mr. Govind Das that, even if it be conceded that Mohkam Chand could execute this decree, the application of 14th December 1914, not to speak of the application of 15th January 1907, is timebarred. Mohkam Chand must take up one position definitely or another. He must say either I am a joint decree-holder along with Dholan Das, or he must say that he is simply a transferee of a portion of Dholan Das's decree. As we have seen, if he takes up the latter position, he cannot apply for execution at all. If, on the other hand, he takes up the former position, there is no getting out of this that he might have applied for execution any day after the execution of the deed transferring part of the decree to him, and under Art. 181 the application of 1907 is out of time; see *Subba Naicker v. Saminatha Iyer* (3). A reference has been made in arguments to O. 21, R. 15, Civil P. C., but I do not think it has any application to the present case, for it only applies where the decree itself makes a number of persons as joint decree-holders. There is no reference to transferees in that rule. Mr.

Govind Das, on the strength of *Tamman Singh v. Lachmin Kunwari* (4), *Moti Ram v. Hannu Prasad* (5) and *Lachman Das v. Chaturbhuj Das* (6) urges that Dholan Das could not give a full discharge to the detriment of Mohkam Chand. But those cases are concerned simply with joint decree-holders and so have little or no application here. For these reasons I dismiss this appeal with costs.

R.M./R.K. *Appeal dismissed.*

(4) [1904] 96 All. 318.

(5) [1904] 96 All. 334.

(6) [1906] 98 All. 252.

### A. I. R. 1919 Lahore 430

SHADI LAL AND DUNDAS, JJ.

*Sharfu and others—Plaintiffs—Appellants.*

v.

*Mir Khan and others—Defendants—Respondents.*

First Appeal No. 607 of 1916, Decided on 23rd July 1919, from decree of Senior Sub-Judge, Hissar, D/- 1st December 1915.

(a) Civil P. C. (1908), S. 47—Persons impleaded as defendants on ground of possession ousted—Separate suit for restoration barred—Suit can be treated as an application.

Persons who are impleaded as defendants to a suit, because they are said to be in possession of the property the mere fact that they take no interest in the litigation are nevertheless parties to the suit and if they are wrongly ousted, their proper remedy is by way of application to the executing Court asking it to restore possession to them. The question whether part of the land in their possession could be claimed or not is one which relates to the execution of the decree. Consequently S. 47 bars a suit by them to restore possession to them. But the suit can be treated as an application under S. 47.

[P 431 C 2; P 432 C 1]

(b) Limitation Act (1908), Art. 165—Applicability.

Article 165 does not apply to an application by a judgment-debtor. [P 432 C 2]

(c) Limitation Act (1908), Art. 181—Application for restoration of possession by judgment-debtor.

An application for restoration of possession by a judgment-debtor is governed by the three years' rule as laid down in Art. 181. [P 432 C 2]

(d) Civil P. C. (1908), S. 47—Person not a party to suit not bound to apply—Right of suit—Remedy of judgment-debtor is by way of application only.

A person who is not a party to the decree is not bound to make an application to the Court executing the decree and may institute a regular suit and that even if he applies and fails, he can still bring a regular suit within one year to establish his right to the property. On the other hand, a party to a decree is precluded from

(1) [1890] 17 Cal. 341.

(2) [1910] 33 Mad. 80=3 I. C. 444.

(3) [1909] 1 I. C. 353.



filing a separate suit and must apply to the Court of execution for redress. [P 432 C 2]

*Nanak Chand Pandit*—for Appellants.  
*Nand Lal*—for Respondents.

**Shadi Lal, J.**—Punnun and three other persons, who are defendants 10 to 13, acquired the village of Dadupur in the Hissar District by means of a pre-emption decree, which they obtained on 19th December 1908. It appears that the pre-emptors did not possess sufficient funds to prosecute their suit to a successful conclusion and stood in need of pecuniary assistance. They had consequently entered into an agreement on 30th November 1907 with various persons with the object of finding money in order to comply with the requirements of the pre-emption decree. In pursuance of the agreement they contracted to sell one-third of the village to Ram Singh and Nidhan Singh on behalf of the tenants of Dhani Dhangapur which is a hamlet comprised in the village of Dadupur. This contract culminated in a decree for the possession of one-third of the village; but the parties to the present litigation are not concerned with it. Confining our attention to the remaining two-thirds of the village, we find that there is a dispute between two sets of rival claimants, both of whom derive their title from the pre-emptors. The present plaintiffs allege that in pursuance of the agreement above referred to they contributed expenses towards the conduct of the pre-emption suit in order to get a proportionate share of the village; and that the pre-emptors, after obtaining possession of the property, transferred to them a certain area of land corresponding to the money contributed by them (plaintiffs). The possession of the property thus transferred was duly delivered to the transferees; and a mutation relating to the transfer was attested by the revenue officer on 1st December 1910.

The rival claimants who are defendants 1 to 9 rely upon a sale-deed of seven and a half biswas out of 20 biswas executed in their favour on 2nd March 1909 by the pre-emptors, and upon the decree which they obtained on the strength of that sale-deed. In the suit, which resulted in that decree, these claimants impleaded as defendants not only their vendors, but also the present plaintiffs who were said to be in possession as tenants of the vendors. The present plaintiffs however

took no interest in the suit; they neither put in a written statement nor appeared at any stage of the litigation. The claim was ultimately allowed by the Chief Court on 6th December 1913; but a proviso was added to the decree by which the share decreed to the plaintiffs was to be taken from the vendors and not from the one-third share belonging to the representatives of Ram Singh and Nidhan Singh, who were also defendants. It appears that the learned Judges were not aware of the sale in favour of the present plaintiffs and no reservation was consequently made in their favour.

The decree-holders applied for execution, and a warrant for possession was issued. The present plaintiffs filed an objection and applied for amendment of the warrant, pointing out that possession was to be taken of the land belonging to defendants 10 to 13 only. This application was granted, and the warrant was amended accordingly. Nevertheless possession of land held by the present plaintiffs was ultimately given to the decree-holders by having them recorded as proprietors of seven and a half biswas in the patwari's papers; and they consequently presented a dakhlanama stating that they had obtained possession. It appears that the present plaintiffs who had obtained possession of the greater portion of the remaining two-thirds share of Dadupur under the terms of the agreement, dated 30th November 1907, were ousted by the aforesaid decree-holders in pursuance of the mutation entry obtained by the latter in execution of their decree; and it was only then that the former became aware that the latter had been given possession, in execution of their decree, of seven and a half biswas. They have consequently brought the present action to recover possession of the land from which they were ousted.

The first question for determination is whether the suit is barred by the provisions of S. 47, Civil P. C. The Subordinate Judge has decided this point against the plaintiffs, and has, after treating the suit as an application, under S. 47, dismissed it holding that it is barred by time under Art. 165, Lim. Act. Now, we have carefully perused the proceedings of the suit which resulted in the decree; and we consider that, though the present plaintiffs took no interest in the litigation, they were certainly parties



to it. It is clear that they were impleaded as defendants because they (were) said to be in possession of the property; and if they were wrongly ousted, their proper remedy was by way of an application to the executing Court asking it to restore possession to them.

Section 47 expressly lays down that all questions arising between the parties to a suit and relating to the execution, discharge or satisfaction of the decree shall be determined by the Court executing the decree, and not by a separate suit. As stated above, the present plaintiffs were parties to the suit; and the question whether the then decree-holders were entitled to recover  $7\frac{1}{2}$  biswas out of the land in possession of the present plaintiffs was one relating to the execution of the decree. We accordingly hold that S. 47 bars the suit, and that the Subordinate Judge was right in treating the suit as an application under that section. The question of limitation is not easy to determine. The learned Subordinate Judge holds that Art. 165 applies to an application for restoration of possession made by a person who has been dispossessed of immovable property, and who disputes the right of the decree-holder to the possession thereof; and that it is immaterial whether the applicant is a party to the decree which is being executed or a stranger. This, no doubt, is the view taken by the Madras High Court in *Ratnam Ayyar v. Krishna Doss Vithal Doss* (1) and it has been followed by the Allahabad High Court in *Hardin Singh v. Lachman Singh* (2). A different view has recently been taken by the Allahabad High Court in *Abdul Karim v. Islamun-nissa Bibi* (3) where the learned Judges held that the legislature in enacting Art. 165 had the provisions embodied in O. 21, R. 100, Civil P. C., in mind, and intended to apply the article to an application made under that rule. In dealing with the argument that the words of the article were wide enough to include an application by a judgment-debtor, the learned Judges made the following observations:

"The argument for the view adopted in the reported cases, and followed by the District Judge in the case, is that the words are wide enough to include a judgment-debtor. Separated from their context this is true. A judgment-debtor is a 'person' in such a case as this.

Moreover the judgment-debtor in his application, under S. 47, is complaining of the same sort of act as an applicant under O. 21, R. 100, would have to complain of. But the moment it is realised that what the schedule to the Limitation Act consists of is an enumeration of suits, appeals and applications of various kinds, and that the language of Art. 165 is merely a definition or description, all difficulty as to the use of the word 'person' disappears. In our opinion the word 'person' in that context, although wide enough to include a debtor, was never used in any other sense than that of a person who is authorised by O. 21, R. 100, to make an application of that description. To hold otherwise would result in this: that if a judgment-debtor applied to the Court under O. 21, R. 100, and adopted the language of Art. 165, his application would have to be dismissed because he is precluded from making an application of that description, and yet if he postpones applying, under S. 47, for more than thirty days, the language of the article is to be applied to him.

Though the matter is not free from difficulty, we are, as at present advised, inclined to concur in the conclusion that Art. 165 was not intended to apply to an application by a judgment-debtor. It is to be observed that a person, who is not a party to the decree, is not bound to make an application to the Court executing the decree; and may, if so advised, institute a regular suit; and that even if he applies and fails, he can still bring a regular suit within one year to establish his right to the property. On the other hand, a party to a decree is precluded from filing a separate suit and must apply to the Court of execution for redress. The application of the rule of thirty days may, in such a case, result in great hardship, because the party concerned may not come to know of the delivery of possession to the decree-holder until after the expiry of 30 days, as actually happened in the present case. This hardship should so far as possible be avoided. Following the ruling in *Abdul Karim v. Islamun-nissa Bibi* (3), we hold that the application for restoration of possession is governed by three years' rule as laid down in Art. 181, and that it should be decided upon the merits. Whether the plaintiffs acquired a valid title to the land prior to the sale in favour of defendants 1 to 9 is a matter which has not been enquired into, and the material upon the record does not enable us to adjudicate upon that issue. If the appellants succeed in proving that they had acquired a valid title to the whole or part of the land in dispute before the sale in favour of the defendants,

(1) [1898] 21 Mad. 494.

(2) [1903] 25 All. 343.

(3) [1916] 38 All. 329=34 I. C. 231.



they are entitled to be restored to the possession of the land proved to be their property, unless their prior title is defeated on some other ground. For the aforesaid reasons, we accept the appeal, and setting aside the decree of the lower Court, remit the case thereto for decision on the merits. The court-fee on the memorandum of appeal shall be refunded and other costs shall abide the event.

R.M./R.K.

*Case remanded.***A. I. R. 1919 Lahore 433 (1)**

SHADI LAL, J.

*Radhe Sham—Accused—Petitioner.*

v.

*Emperor—Opposite Party.*

Criminal Revn. Petn. No. 457 of 1919, Decided on 16th July 1919, against the order of Sess. Judge, Lahore, D/- 25th March 1919.

Criminal P. C. (1898), S. 437—Accused discharged—Further inquiry should not be ordered unless order of discharge is manifestly perverse or based on incomplete record.

Further enquiry into the case of a discharged person should not be ordered, unless the order of discharge is manifestly perverse or foolish or is based upon a record of evidence which is obviously incomplete. Where, therefore the Magistrate recorded the evidence of all the witnesses whom the complainant wanted to produce in support of his complaint and, after considering the evidence, being of the opinion that the story told by them was an improbable one, dismissed the complaint; but the Sessions Judge, holding that the story might be improbable but was by no means impossible, ordered a further enquiry.

*Held:* that this was not a valid ground for dissenting from the conclusion of the Magistrate and for directing further enquiry. [P 433 C 1, 2]

*Tek Chand—for Petitioner.**Moti Sagar and Devi Das—for the Crown.*

**Judgment.**—After perusing the judgments of the lower Courts and examining the arguments advanced by the learned vakils on both sides, I have reached the conclusion that the order of the learned Sessions Judge directing further enquiry cannot be sustained and must be set aside. It is to be observed that the Magistrate recorded the evidence of all the witnesses whom the complainant wanted to produce in support of his complaint, and that after considering that evidence he came to the conclusion that the story told by them was an improbable one, and he consequently dismissed the complaint. The learned Sessions Judge holds that story "may seem an improbable one but it is by no means impossible." Now, I do not think that this is a valid ground

for dissenting from the conclusion of the trial Court and for directing a further enquiry. It is possible that another Magistrate may come to a different conclusion on the evidence, but that does not justify an order for further enquiry. The principle of law enunciated in the Full Bench ruling in *Emperor v. Kiru* (1), though directly applying to a case of fresh enquiry after discharge, has an important bearing on the case before me, in which, as pointed out above, the whole of the evidence on behalf of the complainant was recorded by the Magistrate. The learned Judges laid down in that judgment that further enquiry is improper, unless the order of discharge was manifestly perverse or foolish, or was based upon a record of evidence which was obviously incomplete. Judged by this test, the order of the learned Sessions Judge cannot be upheld. Further, I must say that I am inclined to endorse the view of the Magistrate that it is difficult to believe the story related by the complainant. Accordingly I accept the application for revision and set aside the order directing further enquiry.

R.M./R.K.

*Application accepted.*

(1) [1911] 10 P. R. 1911 Cr.=11 I. O. 132=12 Cr. L. J. 364.

**A. I. R. 1919 Lahore 433 (2)**

MARTINEAU, J.

*Mangat and another—Convicts—Petitioners.*

v.

*Emperor—Opposite Party.*

Criminal Revn. No. 668 of 1918, Decided on 20th July 1918 from order of Dist. Magistrate, Rohtak, D/- 29th April 1918.

Penal Code (1860), S. 297—"Disturbance" implies some active interference in, or hindrance to performance of funeral ceremonies.

The word "disturbance" in S. 297 implies some active interference in, or hindrance to, the performance of the funeral ceremonies. The grand-daughter-in-law of the complainant having died, the complainant and his relations took the body out to the cremation ground and were preparing to cremate it, when the accused came there and told them not to cremate the body, and on being asked why, said that they would state the reason to the Police.

*Held:* that the mere utterance of the words "do not cremate the body" unaccompanied by any attempt to prevent the cremation or by any manifestation on the part of the accused of their intention to interfere if the complainant and his relations should persist in having the body cremated, could not be regarded as a disturbance



to the persons assembled for the performance of the funeral ceremonies within the meaning of S. 297. [P 434 C 1]

*Iftikhar Ali*—for Petitioners.

**Judgment.**—The case against the petitioners is that when the grand-daughter-in-law of the complainant Shiv Ram died, and the complainant and his relations took the body out to the cremation ground and were preparing to cremate it, the petitioners came there and told them not to cremate the body, and on being asked why, said that they would state the reason to the Police. On these facts the petitioners have been convicted of an offence under S. 297, I. P. C. The conviction appears to be wrong. No indignity was offered to the deceased's body and the only question is whether the petitioners caused disturbance to the persons who were assembled for the performance of the funeral ceremonies. The word "disturbance" in S. 297 is not defined, but I take it that the term implies some active interference in, or hindrance to, the performance of the funeral ceremonies. Had the petitioners attempted forcibly to prevent the ceremonies from being performed they would, if they acted with the intention or knowledge mentioned in S. 297, have been guilty of an offence under that section. They might even have been held guilty if they had told the complainant and his relations that they would not allow the cremation to take place. But this did not happen in the present case. The petitioners merely told the complainant and his relations not to cremate the body, and the complainant thereupon left the place and went off to the thana to make report. The mere utterance of the words "do not cremate the body," unaccompanied by any attempt to prevent the cremation, or by any manifestation on the part of the petitioners of their intention to interfere if the complainant and his relations should persist in having the body cremated, cannot be regarded as a disturbance to the persons assembled for the performance of the funeral ceremonies. I therefore accept this application, set aside the convictions and sentences, and acquit the petitioners.

R.M./R.K.

*Petition accepted.*

## A. I. R. 1919 Lahore 434

SCOTT-SMITH, C. J.

*Kanshi and others*—Defendants—Appellants.

v.

*Gauri Shankar and others*—Plaintiff and Defendants—Respondents.

Second Appeal No. 38 of 1918, Decided on 28th January 1919, from decree of Dist. Judge, Ambala, D/- 18th October 1917.

**Pre-emption**—One cosharer cannot contract with his mortgagee that he should have right of pre-emption—Other cosharers are not bound by such agreement—Attestation held amounted to consent—Pre-emptor not enforcing his right for many years would be deemed to have waived his right—His heirs are estopped by his waiver—Evidence Act, S. 115—Waiver, Attestation.

A R and A K inherited one-sixteenth of the property of one S D. A K mortgaged the shop in dispute to one S on 12th February 1887 and covenanted to offer it first of all to the mortgagee in case he wanted to sell it. On 12th September 1891, S sold his mortgagee rights to C. On 18th August 1896 the other heirs of S D sold certain shops including the one in dispute to one A and A K attested the sale-deed as a witness. From A the property passed to S R by a sale in execution proceedings in 1904 and S R mortgaged it to K R who now sued for redemption of the original mortgage made by A K in favour of S in 1887:

**Held:** (1) that A K had no right as against the other cosharers to contract that the mortgagee should have a right of pre-emption in the property and that all the cosharers had a perfect right in 1896 to make an absolute sale of the equity of redemption; (2) that the fact that A K signed the deed of sale implied his consent thereto; (3) that C had waived any right of pre-emption that he may have had by not enforcing his claim when the property was auctioned in 1904; (4) that C and the sons of S who now stood in his shoes were equitably estopped by C's waiver and acquiescence in the previous sale and that the plaintiff's suit must therefore succeed. [P 435 C 2; P 436 C 1]

*Gokul Chand Naran*—for Appellants.

*Jai Gopal Sethi*—for Respondents.

**Judgment.**—This is a second appeal from the order of the lower Court granting the plaintiff a decree for redemption of mortgage of a certain shop on payment of Rs. 500. The facts of the case are briefly as follows: Abdul Rahman and Abdul Karim inherited 1/16 share of Sharf Din's property, which included the shop now in dispute. Abdul Karim mortgaged this shop to Safri by three successive deeds, the last of which was for Rs. 500 executed on 12th February 1887. In this deed there was a covenant that if the mortgagor wanted to sell the shop he should first of all offer it to the mortgagee. On 12th September 1891 Safri sold his mort-



gagee rights to Chuhar Mal. On 18th August 1896 the other heirs of Sharf Din sold certain shops, including the one in dispute, to Asa Ram for Rs. 1,500. Abdul Karim did not join in the sale, but he attested the deed of sale as a witness, thereby implying his consent thereto. From Asa Ram the property passed to Shadi Ram by a sale in execution proceedings in 1904 and Shadi Ram mortgaged it to Kanshi Ram, son of Bhagwan Das, plaintiff. Kanshi Ram has now sued for redemption of the original mortgage made to Safri, and has, as already stated, been granted a decree. The sons of Safri have filed a second appeal to this Court and the contention on their behalf is that under the deed of 12th February 1887 they had a right of pre-emption and were therefore not bound by the sale of the equity of redemption made to Asa Ram on 18th August 1896. Their counsel, Mr. Narang, has referred to the Law of Transfer by Gour, Edn. 4, Vol. 2, p. 941, where it is said that a covenant for pre-emption may be enforced by either a suit for the specific performance of the contract of pre-emption, or the same right may be set up as an equitable defence to the mortgagor's suit for redemption. Should the pre-emptor fail to enforce his right within limitation, his claim, though barred, is not extinguished and he would not therefore be precluded from setting up his equity by way of defence.

In support of this he also cited *Kanharankutti v. Uthoti* (1), *Krishna Menon v. Kesavan* (2) and *Ramasami Pattar v. Chinnan Asari* (3). Mr. Gour however is careful to add that while the pre-emptor is not so fettered by any positive rule limiting his right, it does not thence follow that he may set up the right by way of defence at any time. For in such a case he may have to be confronted with the pleas of laches, waiver, acquiescence or other forms of equitable estoppel. Now, though the right of pre-emption of the sons of Safri cannot now be enforced by reason of the law of limitation, it is still contended that they can set up this right as an equitable defence to the present suit for redemption. The lower appellate Court considers that Chuhar Mal to whom the mortgagee rights were transferred had given up his right of pre-

emption, and in support of this view it relies upon the statement of Chuhar Mal made in a case brought by him on 8th November 1913 against the sons of Safri for rent of the shop in dispute. In that statement he said that defendants' father took the property on mortgage and sold his mortgagee rights to him. The sons of the mortgagor sold their rights to Asa Ram and Shadi Ram bought these rights from Asa Ram in an auction. The learned District Judge considers that this statement shows that Chuhar Mal had waived his right of first refusal which he held under the deed of mortgage of 1887, and that when he re-sold his mortgagee rights to the sons of Safri he re-sold them minus this right of first refusal or pre-emption and that therefore they stand in the shoes of an ordinary mortgagee. Counsel for appellants contends that this meaning cannot be attached to Chuhar Mal's statement.

Mr. Sathi on behalf of the respondents opposes the appeal on two main grounds. In the first place, he says that Abdul Karim, though he may have had a right to mortgage the shop, had no right to contract that the mortgagee should have a right of pre-emption in case of a subsequent sale and that the other heirs of Sharf Din had a perfect right in 1896 to sell the equity of redemption of this shop to whomsoever they chose and that their sale to Asa Ram was a perfectly valid one. He contends that Abdul Karim signed the deed of sale, which shows that he had consented to the sale. I think there is great force in these arguments. It does not appear to me that Abdul Karim had any right as against the other co-sharers to contract that the mortgagee should have a right of pre-emption in the property and that in any case all the co-sharers had the right to make an absolute sale of the equity of redemption in 1896. In the second place it is urged that Chuhar Mal, by not enforcing his claim when the property was auctioned in 1904, undoubtedly waived any right of pre-emption which he may have had prior to the auction. A proclamation of sale must have issued and the presumption is that all the legal formalities were duly complied with. Chuhar Mal was in possession through the sons of Safri and it is a fair inference that he knew about the auction. When he made the statement referred to by the District Judge in the 1913 suit,

(1) [1890] 13 Mad. 490.

(2) [1897] 20 Mad. 805.

(3) [1901] 24 Mad. 449.



he referred to the auction and never said anything about its not being binding upon him. I think he meant at that time to state that the equity of redemption had been validly transferred first of all to Asa Ram and subsequently to Shadi Ram. In my opinion then he and the sons of Safri, who now stand in his shoes, are equitably estopped by his waiver and acquiescence in the previous sale.

The result is that the plaintiff is held to be entitled to redeem and I dismiss the appeal with costs.

R.M./R.K.

*Appeal dismissed.*

### A. I. R. 1919 Lahore 436

SCOTT-SMITH AND MARTINEAU, JJ.

*Narain Dass and another—Plaintiffs—Appellants.*

v.

*Mt. Sahib Bano and others — Defendants—Respondents.*

First Appeal No. 622 of 1915, Decided on 13th June 1919, from decree of Sub-Judge, 1st Class, Mianwali, D/- 13th February 1915.

(a) Registration Act (1908), S. 77—Suit to enforce registration of deed of mortgage on Registrar's refusal to register—Deed creating charge not merely on land already mortgaged but on other land also is entirely new deed and is in contravention of the Punjab Alienation of Land Act (13 of 1900), S. 9 (3).

Where in a suit under S. 77, Registration Act, to enforce registration of deed of mortgage on refusal of the Registrar to register the deed which purported to create a further charge on the lands already mortgaged, was found actually to have created a charge upon other lands also which had not been previously mortgaged, the mortgage deed was held not merely to be an additional charge upon lands already mortgaged but was an entirely new deed and as such was held to be in contravention of the provisions of the Punjab Alienation of land Act, and S. 9 (3) was held inapplicable the suit being merely to enforce registration of mortgage deed. [P 436 C 2]

(b) Punjab Alienation of Land Act (13 of 1900), S. 9 (3)—"Refer the case to the Deputy Commissioner"—Meaning of, explained.

The expression in sub-S. (3), S. 9, that "if a suit is instituted in any civil Court on a mortgage to which sub-S. (1), sub-S. (2) applies the Courts shall refer the case to the Deputy Commissioner" means a suit instituted to enforce some of the terms of a mortgage and does not apply to a suit instituted merely to enforce registration of a mortgage deed. [P 437 C 1]

*Bahadur Chand for Nand Lal — for Appellants.*

**Scott Smith, J.**—This is a first appeal from the order of the Subordinate Judge, Mianwali, dismissing the plaintiffs' suit brought under S. 77, Regis-

tration Act, to enforce the registration of a deed of mortgage the Registrar having refused to register on the ground that the deed contravened the provisions of the Punjab Alienation of Land Act. The order of the Registrar refusing registration will be found printed at pp. 22 and 23 of the paper book. Prior to the deed in suit three previous mortgage deeds were executed by Ghulam Haider Shah or by several of his sons in favour of Khota Shah or of Khota Shah and others. In the deeds of 1878 and 1880 certain *ala milkiyat* rights in land of which the area was not specified were mortgaged and in the deed of 1894 *adna milkiyat* rights in 1529 kanals of land were mortgaged. The present mortgage deed purports to create an additional charge of Rs. 5410 on the land already mortgaged by the deeds of 1878 and 1880. This sum includes Rs. 3050 said to be due under the deed of 1894. Now the deed in dispute creates a further charge upon the *ala milkiyat* rights mortgaged in 1878 and 1880 and also upon 12/28th of 5191 kanals of *adna milkiyat* rights which were not mortgaged by those deeds and the area is very much in excess of 1529 kanals of *adna milkiyat* mortgaged by the deed of 1894. The deed in suit as pointed out by the lower Court contains a false averment to the effect that *adna milkiyat* rights in any land had been mortgaged by the deed of 1878. There is however no doubt that although the deed in question purports to create a further charge on the lands already mortgaged it actually creates a charge upon other lands also which had not previously been mortgaged. Upon this ground alone we hold that the mortgage deed in dispute is not merely an additional charge upon lands already mortgaged but is an entirely new deed and as it is in contravention of the provisions of the Punjab Alienation of Land Act the Registrar's order refusing to register it was perfectly correct. We do not think it necessary to go into other points raised by the lower Court as grounds for refusing registration because upon the ground stated above we consider that the deed should not be registered.

It is finally urged by Mehta Bahadur Chand that the civil Court should have referred the case to the Deputy Commissioner under the provisions of S. 9 (3), Alienation of land Act. The second part



of the subsection in question which the counsel says applies is:

"if a suit is instituted in any civil Court on a mortgage to which sub-S. (1) or sub S. (2) applies the Court shall refer the case to the Deputy Commissioner with a view to the exercise of the power conferred by the subsection applying thereto."

In our opinion it cannot be said that the present suit has been instituted on a mortgage. This expression means a suit instituted to enforce some of the terms of a mortgage whereas the present suit has been instituted merely to enforce registration of a mortgage deed. Sub-S. 9 (3) is therefore inapplicable and we dismiss the appeal *ex parte*.

R.M./R.K. *Appeal dismissed.*

### A. I. R. 1919 Lahore 437 (1)

LEROSSIGNOL, J.

*Radha Kishen*—Petitioner.

v.

*Tirath Ram*—Opposite Party.

Civil Revn. Petn. No. 342 of 1919, Decided on 24th October 1919, from order of Senior Sub-Judge, Amritsar, D/- 11th March 1919.

(a) Punjab Courts Act (3 of 1914), S. 44—Meaning of interlocutory order not clear—Right of High Court to interfere—Commissioner appointed for examination of account—Power to decide legal question—Civil P. C. (1908), O. 26, R. 11.

The proposition of law and practice that the High Court should not interfere with an interlocutory order in revision is sound, but when it is not clear what the Subordinate Judge's order means it can interfere and make the order clear. Question whether settled accounts should be disturbed or not and whether accounts included in one suit can or cannot be included in another suit are legal questions which must be decided by the Court and not by the Commissioner appointed for the examination of accounts.

(P 437 C 2)

(b) Accounts—Settled—Re-opening of, is not allowed unless for fraud or mistake.

It is a correct proposition of law that a settled account cannot be re-opened except on specific allegations of fraud or mistake. (P 437 C 2)

*Santanam*—for Petitioner.

*Manohar Lal*—for Opposite Party.

**Judgment.** — The plaintiff-respondent has obtained an *ex parte* preliminary decree against petitioner, and accounts have now to be rendered by the defendant. A commissioner for the examination of the account had been appointed, when the defendant urged that the Court should decide certain objections before the commissioner commenced his task. The Court below on this passed an order

that the Commissioner was to weigh all objections and counter-objections and then to report. Mr. Manohar Lal for the respondent urges that the order is of an interlocutory description and this Court should not interfere in revision. No doubt that proposition of law and practice is sound, but in this case it is not clear what the Subordinate Judge's order means. If it means that the Commissioner is to decide the objections, then the Subordinate Judge is throwing upon the Commissioner a task which the Subordinate Judge should perform. He is refusing to exercise his jurisdiction. If however his intention merely is that in his examination of the accounts Commissioner is to bear in (my) mind objections and cross objections and is merely to report how those objections affect the account, then the Subordinate Judge's order is correct.

The two main contentions raised by petitioner are that settled accounts are not to be disturbed and that accounts included in another suit by plaintiff are not to be included in this suit. These questions are clearly legal questions which must be decided by the Court and not by the Commissioner, and I need not say more here than that it is a correct proposition of law that a settled account cannot be reopened except on specific allegations of fraud or mistake, but I do not see how specific objections can be decided by the Subordinate Judge until he has a clear statement of accounts before him. I interfere then in this case merely to make it clear that the Commissioner shall report to the Court the condition of accounts between the parties, as disclosed by those accounts alone. Parties to bear costs of this hearing.

R.M./R.K.

*Order modified.*

### A. I. R. 1919 Lahore 437 (2)

MARTINEAU, J.

*Suba*—Defendant—Appellant.

v.

*Shahab Din and others*—Plaintiff and Defendants—Respondents.

Misc. Second Appeal No. 1360 of 1919, Decided on 27th October 1919, from order of Dist. Judge, Lahore, D/- 24th March 1919.

Punjab Pre-emption Act (16 of 1887), S. 15 (b)—Cosharer only in well and not in agricultural land sold is not entitled to pre-



empt—Right of pre-emption is adjunct or appendage alone—Punjab Laws Act, S. 12 (a).

Where a share in well held separately from land is sold, the mere fact that the person is a cosharer only in the well, with path attached to it, by which the rest of the land was irrigated and not in the agricultural land sold, and does not get the right of pre-emption in the land held separately, it being a mere appendage or adjunct to other land and cannot be treated as a property separable from the rest of the land. Right of pre-emption in it alone on the strength of his being a cosharer therein cannot be claimed when he has no such right in other land sold.

[P 438 C 1]

*Niaz Muhammad*—for Appellant.

*Mehr Chand*—for Respondents.

**Judgment.**—The plaintiff sued to pre-empt 40 kanals, 8½ marlas of land, land, sold, by defendants 1, 2, and 3 to Suba, defendant 4, on the ground that he was a cosharer therein. This land included 38 kanals 6 marlas in khata 165 and half of 3 kanals 5 marlas in khata 166. The latter khata comprises only the well by which the rest of the land is irrigated and the path to the well. It was found that the plaintiff was not a cosharer in khata 165, and the first Court held, following *Shahu v. Haku* (1), that although the plaintiff was a cosharer in khata 166 this fact would not give him a right of pre-emption, khata 166 being a mere appendage or adjunct to the other khata. The Subordinate Judge therefore dismissed the suit.

At the hearing of the appeal in the District Court counsel for the plaintiff limited his claim to khata 166 and the District Judge held that *Shahu v. Haku* (1) was inapplicable and that this small plot of land still remained subject to the right of pre-emption, and he remanded the case. The defendant vendee has filed a second appeal in this Court. The land in suit formerly belonged to Rahim Bakhsh and Chiragh Din. There was a partition between them in 1867, and what is now khata 1865, was included in the partition and apparently fell to the share of Rahim Bakhsh, but khata 166 was kept joint as it was incapable of being partitioned.

In *Bodi v. Mt. Mahtab Bibi* (2) the land in dispute consisted, as in the present case, of a certain area held separately and of a share in a well, with paths attached to it, which was used for irrigating the agricultural land sold. It was held that the land in suit was not

joint undivided immovable property within the meaning of 12 (a). Punjab Laws Act. It had been divided so far as it was possible to divide it, and the joint partition (portion) was a mere appendage of that held separately, which could not be separated from it. That ruling was followed in *Shahu v. Haku* (1). I see no essential distinction between those cases and the present one. It is true that the plaintiff is now limiting his claim to a share in the small portion of land, namely, the well and the path, in which he a cosharer, whereas in the cases mentioned above the claim was for the whole of the land sold, but the principle laid down in those cases nevertheless applies. Khata 166 consisting as it does of the well which irrigates khata 165, and the path to the well, is clearly an adjunct or appendage to khata 165, and the plaintiff cannot treat it as a property separable from khata 165 and claim a right of pre-emption in khata 166 alone on the strength of his being a cosharer therein when he has no such right in khata 165. Moreover he did not take up this position in the trial Court, but it was argued on his behalf that his joint ownership of khata 166 entitled him to a decree for the whole of the land in suit. The appeal before the District Court also was for the whole land, and it was only at the hearing that plaintiff's counsel gave up his claim to khata 165.

It is contended for the respondent that the law has been changed by the passing of the Pre-emption Act, but this contention is not correct. The words used in S. 15 (b), Pre-emption Act, are "joint land or property." The omission of the word "immediate" ("undivided") which occurred in S. 12 (a) of the Punjab Laws Act, is in no way material. The suit therefore fails. I accept the appeal, set aside the order of the lower appellate Court, and restore the decree of the first Court. The plaintiff respondent will pay the appellant's costs in this Court and in the lower appellate Court. The parties will bear their own costs in the trial Court as directed by the decree of that Court.

R.M./R.K.

*Appeal accepted.*

(1) [1900] 44 P. R. 1900.

(2) [1892] 131 P. R. 1892.



## A. I. R. 1919 Lahore 439

CHEVIS AND BROADWAY, JJ.

Kishan Narain—Plaintiff—Appellant.

v.

Pala Mal and others—Defendants—Respondents.

First Appeal No. 1384 of 1915, Decided on 16th March 1918, from decree of Dist. Judge, Delhi, D/- 20th February 1915.

(a) Transfer of Property Act (1882), S. 99—Principle of S. 99 does not apply to Punjab having been repealed by Civil P. C. O. 34, R. 14.

Section 99, T. P. Act having been repealed by O. 34, R. 14, Civil P. C. which has been expressly held to be not applicable to the Punjab, the principle of that section can no longer be applicable to this Province. [P 429 O 2]

(b) Civil P. C. (1908) O 2, R. 2—Mortgage—Suit for interest—Subsequent suit for principal and interest is barred.

Where a mortgagee has already sued and obtained a decree for interest at a time when he could also have sued for the principal, his subsequent suit for the recovery of the principal is barred by O. 2, R. 2. [P 440 O 1]

Moti Sagar—for Appellant.

Sheo Narain and Sardha Ram—for Respondents.

**Judgment.**—In this case the mortgagee sued for interest in 1908 and obtained a decree for Rs. 2,266-13-0 with charge on the property mortgaged. In execution proceedings he had the equity of redemption attached. The judgment-debtor objected, quoting O. 34, Civil P. C. and urging that the mortgagee could not bring the property to sale on such a decree, and that if he wanted to sell up the property he should "get a decree according to law." The first Court disallowed his objections but on 27th October 1913 Mr. Clifford, Additional Divisional Judge, allowed the objections on appeal, holding that the lower Court's order was opposed to O. 34, R. 14, Civil P. C., and to *Jagan Nath v. Budhwa* (1), and that the latter ruling must be followed in preference to *Koshi Pershad Singh v. Jamuna Pershad Sahu* (2), on which the lower Court had relied. The mortgagee then brought this suit for principal and interest, and it has been dismissed by the lower Court as barred by O. 2, R. 2. Hence this appeal. For the appellant it is urged that the respondent is estopped from pleading O. 2, R. 2, as he has himself in his former objections invoked the aid of O. 34, R. 14, which itself lays down

that O. 2, R. 2, is not to be a bar to a fresh suit in such cases. We are however of opinion that all that the judgment-debtor meant to do when he quoted O. 34, was to claim the benefit of the principle embodied in the first part of Cl. (1) of the rule. He cannot have meant to rely on the whole of that rule, for Cl. 2 of the rule expressly lays down that nothing in Cl. 1 shall apply to any territories to which the Transfer of Property Act has not been extended. So O. 33, R. 14 (1), does not apply to Delhi at all, and the second part of it cannot be used to evade the provisions of O. 2, R. 2. Nor can the first part of it be applied, but it is, of course, arguable that the principle therein embodied may be applied, for in fact that is practically Rai Sahib Moti Sagar's second contention in this case. The respondent certainly never bound himself down to refrain from pleading O. 2, R. 2, as a defence, and we are of opinion that in quoting O. 34, in his objections he only meant to rely on the principle embodied in the first part of O. 34, R. 14, Cl. 1.

Whether Mr. Clifford's order was right or wrong we need not now decide. We can only hold that O. 34, R. 14 Cl. (1), is inapplicable to the Punjab or Delhi, and we have considerable doubts whether *Jagan Nath v. Budhwa* (1) still holds good under the new Civil Procedure Code. But if Mr. Clifford's order was wrong, the decree-holder should have attacked it by further appeal. All that we have to decide now is the question of estoppel, and as we hold that the respondent never meant to rely on the latter part of Cl. (1), O. 34, R. 14, or to bind himself down not to plead O. 2, R. 2, we hold that there is no estoppel. Rai Sahib Moti Sagar's next contention is that even apart from O. 34, R. 14, he can still maintain the suit, the principles of S. 99, T. P. Act, being still applicable to the Punjab. But this section has been deliberately repealed by the legislature, and has been replaced by O. 34, R. 14, which has been expressly held to be not applicable to the Punjab. After this to apply the principles of S. 99 is, in our opinion, out of the question. As is aptly said in *Mehr Bakhsh v. Sanjhe Khan* (3):

"It is exceedingly difficult to see how, in view of the change of the law thus effected by the latest legislative enactment on the subject under

(1) [1907] 2 P. R. 1907.

(2) [1904] 81 Cal. 922.

(3) [1916] 18 P. R. 1916=89 I. O. 602.



consideration, the Courts of this Province, to which the Transfer of Property Act has never been extended, can recognize and act upon the technical rule embodied in S. 99 of the Act."

We note also that the principle embodied in S. 99 is contained in the first five lines, and that the last two lines which say:

"he may institute such suit notwithstanding anything contained in the Code of Civil Procedure, S. 43,"

can scarcely be described as containing a "principle." Lastly Rai Sahib Moti Sagar urges that O. 2, R. 2, is no bar because client was not bound under the terms of the mortgage-deed to sue for principal and interest at once. True, but the fact remains that at the time when he sued for interest he could also have sued for principal; he did not do so, and so the subsequent suit is now barred by O. 2, R. 2. This appeal fails and is dismissed, but the appellant seems to be a heavy loser, and we pass no order as to costs of this appeal.

R.M./R.K.

*Appeal dismissed.*

### A. I. R. 1919 Lahore 440

SCOTT-SMITH AND MARTINEAU, JJ.

*Emperor*

v.

*Jagat Ram—Accused.*

Criminal Appeal No. 172 of 1918, Decided on 29th July 1918, from order of Addl. Sess. Judge, Lahore, D/- 29th October 1917

(a) Criminal P. C. (5 of 1898), Ss. 222, 234 and 235—Joint trial for criminal breach of trust and falsification of accounts is permissible if accounts made to conceal act of misappropriation forms part of same transaction—Trial for criminal breach of trust during period exceeding one year is contrary to S. 234—Duty of Court laid down—Appeal from acquittal—Retrial should not be ordered on mere technical grounds.

A charge of criminal breach of trust of a sum of money can be tried under S. 235 (1), Criminal P. C., at the same time with one of falsification of accounts made to conceal the act of misappropriation as part of the same transaction but a charge of criminal breach of trust cannot be legally tried together with one of falsification relating to a distinct act of misappropriation committed in a separate transaction: 40 Cal. 318, *Foll.* [P 441 C 2]

The accused was jointly tried of offences falling under six different charges, viz: (1) criminal breach of trust of a sum during the period 17th September 1914 to 25th March 1915; (2) criminal breach of trust of a sum during the period 26th March 1915 to 31st March 1916; (3) criminal breach of trust of a sum during the period 1st April to 31st May 1916; (4) criminal breach of trust of a sum during the period 1st June 1916; to 9th October 1916; (5) preparation of a false

balance sheet of the Lahore Electric Supply Company for the year ending 31st March 1915; (6) preparation of a false balance sheet for the year ending 31st March 1916; and was acquitted. Government preferred an appeal to the Chief Court against the acquittal.

*Held:* (1) that charges (1) and (5) could have been tried together, because the preparation of the false balance sheet for the year ending 31st March 1915 was effected to conceal the criminal breach of trust which had been committed during the period ending 25th March 1915; [P 441 C 2]

(2) that similarly charges (2) and (6) could have been tried together and charges (4) and (5) could also have been tried together in one trial as they related to two offences of the same kind committed within the space of 12 months;

[P 441 C 2]

(3) but that the trial of all six charges in one trial was contrary to S. 234, Criminal P. C., and was quite illegal;

[P 441 C 2]

(4) that charge (2) contravened S. 222, Criminal P. C., and the trial of that charge was in itself quite illegal; 25 *Mad.* 61 (P. C.), *Foll.*

[P 441 C 2]

(5) that the Court before the commencement of the trial should have recorded an order to the effect that it was trying such charge or charges and should have proceeded to take all the evidence relating thereto, the trials should have been quite distinct and the accused should have been apprised as to which charges were being tried in each trial and the opinions of the assessors should have been recorded separately in each;

[P 441 C 2, P 442 C 1]

(6) that it would not be fair to the accused who had been acquitted to order a retrial simply because the trial was illegal on account of misjoinder of charges, unless the Court was satisfied that the order of acquittal was obviously erroneous or was not one which should be maintained owing to the trial Court having omitted to consider material evidence for some other sufficient reason;

[P 442 C 1]

(7) that the onus was on the prosecution to prove affirmatively that the accused received any sums beyond those entered by him as having been received;

[P 443 C 2]

(8) that it could not on the evidence be said for certain that the accused was in charge of all the money received by the company; [P 446 C 1]

(9) that in view of all these facts it was not one of those exceptional cases where supposing the trial had been legal, the Chief Court would reverse the order and convict the accused and that therefore a retrial should not be ordered.

[P 446 C 1]

(b) Criminal Trial — Circumstantial evidence—Principle explained — Inculpatory facts must be incompatible with innocence of accused.

One of the cardinal principles of cases based upon circumstantial evidence is that in order to justify the inference of guilt the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other hypothesis other than that of his guilt.

[P 446 C 1]

*Mul Chand*—for the Crown.

*Ganpat Rai*—for Appellant.

*Muhammad Shafi, Haq Nawaz and Raghu Nath Sahai*—for Accused.



**Judgment.**—This is an appeal by the Crown from the order of the Additional Sessions Judge, Lahore, acquitting the accused Jagat Ram of four separate charges of criminal breach of trust under S. 408, I. P. C. and of one charge of falsification of accounts under S. 477-A, I. P. C. The facts of the case appear sufficiently from the judgment of the learned Additional Sessions Judge and from the evidence of Mr. Robinson, late Secretary of the Lahore Electric Supply Company, recorded by the Committing Magistrate and of Mr. Ganguly (P. W. 15), and it is unnecessary for us to repeat them.

The first ground taken by Mr. Mul Chand on behalf of the Crown is that the joint trial of all the offences together was illegal and in particular that the charge relating to criminal breach of trust covering a period from 25th March 1915 to 31st March 1916, a period exceeding one year is contrary to the provisions of S. 222, Criminal P. C. The Sessions Judge in his judgment says that there were six charges and not five as appears from the record the extra one being a second charge under S. 477-A, I. P. C. and relating to the falsification of balance sheet of 31st March 1916, and that in all of these charges evidence was taken together with the consent of counsel on both sides. There is however nothing on the record to show that there were separate trials and that the evidence was recorded in one of them. What is apparent from the record is that there was really one and only one trial. The charges framed by the Committing Magistrate were, as stated by the Sessions Judge, as follows:

(1) criminal breach of trust of the sum of Rs. 2,948-6-0 during the period 17th September 1914 to 25th March 1915; (2) criminal breach of trust of the sum of Rs. 10,069-9-1 during the period 26th March 1915 to 31st March 1916; (3) criminal breach of trust of the sum of Rs. 3,447-1-9 during the period 1st April to 31st June 1916 (sic); (4) criminal breach of trust of the sum of Rupees 2,225-14-9 during the period 1st June 1916 to 9th October 1916; (5) preparation of false balance sheet of the Lahore Electric Supply Company for the year ending 31st March 1915; (6) preparation of a false balance sheet for the year ending 31st March 1916. There is however no such charge as this last one upon the

record and none appears to have been framed by the Committing Magistrate.

At the end of the trial it appears from the record that counsel for the Crown stated that the charge under S. 477-A actually framed ought to have had reference to the balance sheet for the year ending 31st March 1916 and not for the previous year, but in spite of this the Court made no amendment of the charge. It also omitted to amend charge No. 3. There is no such date in the calendar as 31st June 1916 and it is explained, and is quite clear that the date ought to have been 31st May 1915. It is to be regretted that the Court below did not carefully scrutinize the charges at the commencement of the trial and amend them where necessary. Now it was held in *Emperor v. Jiban Krishna Bagchi* (1) that a charge of criminal breach of trust of a sum of money can be tried under S. 235 (1), Criminal P. C., at the same time with one of falsification of accounts made to conceal the act of misappropriation as parts of the same transaction, but that a charge of criminal breach of trust cannot be legally tried together with one of falsification relating to a distinct act of misappropriation committed in a separate transaction. In accordance with this authority it is clear that charges Nos. 1 and 5 could have been tried together, because the preparation of the false balance sheet for the year ending 31st March 1915 is said to have been effected to conceal the criminal breach of trust which had been committed for the period ending 25th March 1915. Similarly charges Nos. 2 and 6 could have been tried together, and charges Nos. 4 and 5 could also have been tried in one trial, as they related to two offences of the same kind committed within the space of twelve calendar months, but the trial of all six charges in one trial was contrary to S. 234, Criminal P. C., and was quite illegal. Moreover charge No. 2 contravenes S. 222, Criminal P. C., and the trial of this charge was in itself quite illegal: see the well-known judgment of the Privy Council reported as *Subrahmaniam Ayyar v. King-Emperor* (2).

The Court before the commencement of the trial should have recorded an order to the effect that it was trying such and

(1) [1918] 40 Cal. 318=20 I. O. 412=14 Cr. L. J. 428.

(2) [1902] 25 Mad. 61=28 I. A. 257 (P. C.).



such a charge or charges, and should then have proceeded to take all the evidence relating thereto. Thereafter it should have taken up one of the other charges or set of charges and the evidence of witnesses already taken in the first case, so far as it was material to the second one, could have been read over and put in with the consent of counsel, and any fresh evidence specially bearing upon the charge or charges then being tried should have been taken. Similarly with the third case, but the trials should have been quite distinct, and the accused should have been apprised as to which charges were being tried in each trial, and the opinions of the assessors should have been recorded separately in each.

Mr. Mul Chand suggested that without going into the merits of the case we should set aside the trial as illegal and order a re-trial, but we considered that it would not be fair to the accused who has been acquitted to do this, unless we were first satisfied that the Court's order of acquittal was obviously erroneous, or was not one which should be maintained owing to its having omitted to consider material evidence or for some other sufficient reason. In this connexion we have borne in mind the principles enunciated in *King Emperor v. Chattr Singh* (3), the leading authority of this Court on the subject of appeals from orders of acquittal. We have therefore heard lengthy arguments on the merits, and after long and anxious consideration have come to the conclusion that this is not one of those exceptional cases where a High Court should interfere with an order of acquittal. In addition to bearing in mind the principles in *King-Emperor v. Chattr Singh* (3), we cannot in the present case lose sight of the fact that the Judge who presided over the trial was an officer of wide experience in accounts, having recently been Liquidation Judge in Lahore for several years, and that his opinion coincided with that unanimously expressed by three intelligent and well-educated assessors one at least of whom, Mr. Framji, is a merchant.

Briefly the charge against the accused is that he, when accountant and treasurer or cashier in the employment of the Lahore Electric Supply Company, committed criminal breach of trust in res-

pect of the sums of money set forth in the charges, and that in order to conceal his misappropriations, he framed or assisted in framing false balance sheets. The method in which the money was misappropriated is described with great clearness in the evidence of the late Secretary, Mr. Robinson, recorded by the Committing Magistrate and in that of Mr. Ganguly (P. W. 15) and in the latter's report Ex. P. W. 8. When the balance sheet had to be prepared for the years ending 31st March 1915 and 1916 respectively, there was a difference between the cash balance as appearing in the Company's general ledger and in the pass book of the Bank of Bengal, and this had to be reconciled. All money was sent or was supposed to be sent to the Bank of Bengal up to the 31st May 1916. After that date the Company dealt with the Punjab National Bank, and on this account two charges have been framed in regard to the misappropriations said to have occurred between 1st June 1916 and 9th October 1916. Mr. Ganguly's evidence and report explain very clearly how the balance as appearing in the Company's books was reconciled with that shown in the Bank pass book.

The first and most important question in the case is, who had charge of the money and cheques received from consumers of energy and other debtors of the Electric Supply Company. The accused, Jagat Ram, was appointed accountant in March 1914. At that time one Jiwan Ran was treasurer and his services were dispensed with a few months later owing to certain defalcations in cash and stores belonging to the Company. He used to receive all payments and give receipts, but under the new system inaugurated after his dismissal the receipt clerk Gian Chand, P. W. 4, received payments and gave receipts. He entered these payments in the energy and his miscellaneous cash registers, from which the general cash register and the general ledger were prepared. The general cash register was prepared by various clerks in the office and the general ledger was prepared by the Secretary. None of these registers were in the charge of the accused. The allegation of the prosecution is that Gian Chand on the evening of each day, or at latest on the morning of the following

(3) [1904] 7 L. R. 1904 Cr.=1 Cr. L. J. 781.



day, took the amount received by him to the accused who sent it, or should have sent it, to the Bank along with the paying-in-slip. Gian Chand and his successor, Charan Das, who relieved him on 16th April 1916, say that they always paid the whole amount, and gave all the cheques received by them, to the accused and kept nothing in their own possession.

It has however come out in the evidence that money was often spent by them out of the current income in order to meet current expenses and also that they did not always hand over the money to the accused on the day of receipt. They were recouped for the sums thus spent by them by company's cheques, and these they say were made over to the accused who should have paid them into the bank. It is however admitted that they were not so recouped till some days later, and it is therefore obvious that the total daily receipts could not have been made over daily to the accused, and if partial receipts were made over to him, one would certainly have expected to find that he would have given some acknowledgments to the receipt clerks. He might, for instance, have initialled in the receipt counterfoil books or in the cash registers the items actually received by him, but he never acknowledged anything in writing at all. It was said that when he took the money and cheques from the receipt clerks he compared the amounts with the registers kept up by the latter, but if so, why did he not sign in them in token of having received them? The evidence as to whether he compared the receipts with the entries in any register is conflicting. Rai Bahadur Narinjan Das, Managing Director, P. W. 1, says that he used to see accused making comparisons with the entries in some books, but his evidence on the point is not very definite and Hans Raj, P. W. 5, says that he used to see Gian Chand paying over the money to the accused but that no book or register was shown to the latter at the time.

Now, what the accused says is that the receipt clerk brought him so much money in cash and cheques, and he entered particulars thereof on the paying-in-slips and then sent the money and slips to the bank. He came to know that the moneys paid to him by the receipt clerks were not all that they had received up

to date. This he reported to the Secretary who, he says, told him that the receipt clerks could not make over the full amount of the day's receipts to him as they had to spend out of the current income. He told accused that he himself was responsible and that accused need not worry. He also says that he made entries on the back of the paying-in-slips in accordance with the statements made to him by the receipt clerks and with the permission of the Secretary. These notes at first were made in ink and stated that the remittances were of receipts up to such and such date, but after some time they were made in pencil and merely showed that the receipts of certain dates were still outstanding. These pencil notes were of the following sort, e. g., O 25, 26, which meant that the receipts of the 25th and 26th of the current month were still outstanding. A great deal has been said about these notes in argument, and it has been contended that they are a clear indication of the accused's guilt. There is however a good deal to be said for the lower Court's view that it is not likely that the accused, if misappropriating the money, would have kept the record of his defalcations on the back of the paying-in-slips which were subsequently sent to the bank and open to everybody's inspection. In our opinion, the accused's object in making these entries on the slips might have been to shew that he was not responsible for anything more than the sums actually sent to the bank. The entries are in a sense his acknowledgments of having received the amounts entered in the slips and nothing more from the receipt clerk.

We agree with Mr. Shafi, counsel for the accused, who has argued that the onus was on the prosecution to prove affirmatively that the accused received any sums beyond those entered by him in the slips. The evidence of Rai Bahadur Lala Narinjan Das and other prosecution witnesses that they used to see moneys being counted over to the accused is quite compatible with his statement that he only received the sums entered in the slips and forwarded by him to the bank. There is no evidence on the record that he received more than these sums beyond that of the receipt clerks, and as the learned Sessions Judge remarks: "They have to save themselves and are therefore highly interested witnesses." It



has been urged by Mr. Mool Chand that at first, when the amount withheld by the receipt clerk was small, the accused might have thought that things were all right, but that when the amount reached Rs. 13,000 odd at the end of March 1916 he must have suspected something to be wrong. The accused says that about the end of September 1914 the receipt clerk did not bring any money for some days for remitting to the bank, and that he brought this matter to the notice of the Secretary who, as already noted, replied that as the receipt clerk was authorized to spend from the daily collections, he could not remit the complete amount unless he was recouped. The Secretary further told him that he would himself check the accounts from time to time and would take over charge of the general ledger and the bank pass book. Accused says that again in October 1914 he brought to the notice of the Manager and the Secretary that the receipt clerk was not regular in sending the amounts of payments to the bank. He says that the Secretary also told him that it was his (the Secretary's) duty to see whether the amounts were going regularly to the bank or not. Mr. Robinson denies that he had any such conversation with the accused, but as there appear to be good grounds for considering that either he or the accused was privy to the embezzlement, it is the word of Mr. Robinson against that of the accused, and the evidence of the former must therefore be received with great caution.

If the accused did bring this matter of short remittances to the secretary's notice as he says he did and was answered as he says he was, there was no need for him to worry further in the matter even where the amount held back by the receipt clerk became large. He says that he was never appointed cashier or treasurer of the company, and he was certainly never shown as such in the list of the employees of the company and no security was ever taken from him. Rai Bahadur Lala Narinjan Das no doubt says that he had to perform the duties of the cashier, but he was also forced to admit that specific duties were not assigned to the various employees of the company. Charan Das says that he was appointed treasurer in March 1916, but he never took over the duties of the treasurer because he could not give the security demanded

of him. It is extraordinary that the accused should have been allowed to remain as treasurer without security being demanded from him. He kept none of the registers which we should have expected him to keep had he really had charge of, and been responsible for, all money received by the company. In our opinion it cannot on the evidence be said for certain that the accused was in charge of all the money so received. We next proceed to consider what are called the reconciliation statements, and Mr. Mul Chand has stated repeatedly in his argument that they furnished the main reason for considering accused's guilt to be proved. These statements were prepared in connection with the annual balance sheet of the company and the object of them was to reconcile the balance as appearing in the company's general ledger with that shown in the pass book of the Bank of Bengal.

It is necessary to prepare these statements in any case, because even if there had been no misappropriations at all, the balance shown in the company's ledger would not correspond with that shown in the bank pass book on any particular date because (1) there would be outstanding cheques drawn by the company in favour of their creditors and not yet presented to the bank to be cashed, and (2) there would be remittances of cheques made to the bank and not yet credited because of non-realization. It is admitted that such cheques were not credited until after realization. These reconciliation statements show remittances of certain dates as in transit to the bank when in fact there had been no such remittances. Mr. Mul Chand asks, why did accused show that the amount of certain remittances should be added to the balance when, according to his own statement, he knew the amount represented receipts of certain dates which were still in the hands of the receipt clerks which had not yet been remitted at all. Mr. Robinson explained that the entry should really have been "collections" and not "remittances." Now as a matter of fact up to 31st March 1915 and 1916, respectively, certain remittances had been made to the Bank of Bengal which had not yet been credited in the pass book. The actual amount misappropriated as on those dates was considerably less than the amount



shown as remittances of certain specified dates not yet credited by the bank. The entry in the reconciliation statement should really have been neither "remittances" nor "collections." Part of the deficiency consisted of remittances actually made but not yet credited, and the rest represented collections actually made but not yet remitted to the bank. A mere misdescription of this sort in these statements would not necessarily be dishonest or fraudulent. What however does appear to be dishonest in them is that in their preparation certain sums representing the exact amount of defalcation as on those dates were taken into credit twice over (see in this connection Mr. Ganguly's report, Ex. P. W. 8). To put it shortly, the amounts shown as remittances to the bank but not yet credited include sums which had been really credited by the bank. The crux of the whole matter really is: "who prepared these statements?" Now the learned Sessions Judge is wrong in thinking that both were in the handwriting of Mr. Robinson. That of 1915 is in his handwriting but that of 1916 is in that of the accused. Mr. Robinson says that he prepared the statement of 1915 in accordance with the figures supplied to him by the accused which he did not check, whereas the accused says that he wrote out that for 1916 under the instructions of Mr. Robinson; in other words, each wants to shift the responsibility to the other. Now these statements were prepared, as already stated, in connection with the annual balance sheets. These latter were prepared by the secretary and he was primarily responsible for their correctness.

It was therefore incumbent upon him to reconcile the balance as appearing in the company's ledger with that appearing in the bank pass book, and it can hardly be believed that he left this duty entirely to the accused. He certainly should not have done so. He himself maintained and kept in his possession the general ledger, and Mr. Ganguly has stated (see p. 172 of the record) that the reconciliation statement for 1916 could have been prepared without reference to the paying-in-slips as the necessary information could be gathered from the general ledger and the bank pass book. Mr. Mul Chand urged that this was wrong and that no one could have pre-

pared the statement without reference to the paying-in-slips. We have carefully examined the general ledger and we find that both the reconciliation statements could easily have been prepared by a reference to it and the bank pass book. No reference to the paying-in-slips was necessary for the preparation of these statements. None of the books which had to be used in their preparation were in the custody of the accused. All of them were with the secretary. The statement of 1915 is in his handwriting and every item is tickmarked by him. We see no reason why we should assume that the accused must have had the chief hand in its preparation. Once it is admitted that Mr. Robinson prepared the reconciliation statement for the period ending 31st March 1915, it is not difficult to hold that he probably prepared that for the period ending 31st March 1916 also, even though it is in the handwriting of the accused. It is certainly not shown beyond doubt that the accused prepared either of these statements and the probabilities, in our opinion, point to the view that Mr. Robinson prepared them.

It therefore appears to us that these reconciliation statements, upon which Mr. Mul Chand has laid such very great stress, do not at all necessarily shew that the accused must either have been guilty of the misappropriations or have abetted the misappropriations. No doubt the accused or Mr. Robinson was privy to the embezzlements, but the facts, as appearing from the evidence, cannot be said to be inconsistent upon any reasonable hypothesis with the theory of the accused's innocence. Another point upon which some stress was laid by Mr. Mul Chand was the accused's conduct when first taxed with the deficiency. The deficiency with which he was taxed was that relating to the period between 1st June and 9th October 1916. The amount entered in the charge relating to this period represents short remittances made to the Punjab National Bank, and the accused who was ill at the time and absent from duty was made to pay it up. He did so under protest. He is said to have stated at first there must have been some mistake in the books and that he would see to it when he returned to office. He did not at that time disclaim all responsibility and say that the cash was not in



his charge at all. What he said at that time rests mainly upon the evidence of Mr. Robinson and the receipt clerks who are interested witnesses, but in any case we do not think very much stress should be laid upon the accused's conduct at that time. He was ill and absent from the office and was faced with a very serious charge. It is quite possible that he got frightened and in that condition made the statements ascribed to him.

The matter to which the learned Sessions Judge might have given more attention is this, that after 31st March 1916 no pencil notes were made on the back of the paying in-slips by the accused. He should in our opinion have been asked why he ceased to make those notes. He also should have been asked whether, when Charan Das took over the duties of the receipt clerk from Gian Chand on 16th April 1916, he informed him that the collections of certain dates were still outstanding and asked him to look into the matter. Accused made good the amount outstanding in the accounts of the Punjab National Bank, but he did so under protest and his conduct in doing so certainly does not prove anything against him. The main charges relate to the embezzlement of Rs. 16,000 odd which should have been but was not paid into the Bank of Bengal. We cannot hold that it is proved beyond all reasonable doubt that the accused must have embezzled all this money, or have been privy to the embezzlement. It is not in our opinion proved, as we have stated above that the accused had charge of all the moneys paid into the company. The other evidence on the record is purely circumstantial, and one of the cardinal principles of cases based upon circumstantial evidence is that in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused, and incapable of explanation upon any other reasonable hypothesis than that of his guilt: See Wills on Circumstantial Evidence, Edn. 6, p. 311. In our opinion so far as the evidence goes we consider it just as likely that the embezzlements were committed by the receipt clerks with the connivance of the Secretary, Mr. Robinson, as that they were committed by the accused with or without the help or connivance of any one else. In addition to this we cannot ignore the facts that an experienced Judge

and three educated assessors have concurred in holding that the accused's guilt is not proved and that the accused has been acquitted. We are very clear that this is not one of those exceptional cases where, supposing the trial had been legal, we should reverse the order and convict the accused, and in these circumstances we decline to order a retrial.

We feel it to be our duty before closing this judgment to say that the commission of the frauds and the apparent impossibility of bringing responsibility home with certainty to any one were due to the utter lack of system in the affairs of the company and to the want of supervision in the office. The secretary at the end of each financial year should have counted the cash and cheques in the hands of the persons who had charge of them, and he could then easily have seen whether there was any deficiency in the balance in their hands. If Mr. Robinson was not himself a party to the frauds, he obviously exercised no supervision at all over his subordinates in the office. Had he exercised any, he could not have failed to discover the frauds which would have been nipped in the bud. It is also clear that Pandit Balak Ram (P. W. 13) of the firm of Messrs. Basant Ram and Sons, Auditors, must have performed his duty of auditing the accounts of the company in an extremely perfunctory manner. He audited the accounts of the company for the years ending 31st March 1915 and 1916, and yet he failed to discover anything amiss. He saw that there was a difference between the balance as appearing in the books of the company and in the pass book of the Bank of Bengal, and he saw how this difference was reconciled. It was perfectly easy for him to see by a careful examination of the general ledger and other registers whether the reconciliation statements were correct or not, but he apparently accepted the explanation of the employees of the company without making any thorough examination on his own account. The appeal is dismissed and Jagat Ram is discharged from his bail.

R.M./R.K.

*Appeal dismissed.*



**A. I. R. 1919 Lahore 447 (1)**

CHEVIS, J.

*Daulat Rai*—Plaintiff—Appellant.

v.

*Jagat Ram and another*—Defendants—Respondents.

Misc. Appeal No. 804 of 1917, Decided on 8th April 1918, from order of Dist. Judge, Multan, D/- 14th November 1916.

Civil P. C. (1908), O. 22 R. 3—Cross appeals in pre-emption suit—Vendee dying—Vendee's appeal dismissed for default—Pre-emptors applying to bring legal representative on record—Pre-emptor's appeal decreed ex parte without notice to legal representative—Application by him to be brought on record—Limitation runs from his knowledge of decree—Period is six months—Limitation Act (1908), Arts. 169 and 176.

The pre-emptor and the vendee both appealed from a decree in a pre-emption suit. Before the appeals could be heard the vendee died, and his appeal was dismissed for default. The pre-emptor applied to bring the representative of the deceased vendee on the record. The application was granted, but before the notice could be served on the representative the pre-emptors's appeal was decreed ex parte. The vendee's representative thereupon made an application (a) for setting aside the ex parte decree in the pre-emptor's appeal and (b) for getting himself substituted on the record as appellant in his father's place:

*Held:* (1) that no notice having been served on the applicant, limitation for the application for re-hearing the appeal which had been decreed ex parte commenced from the date on which the applicant had knowledge of the decree; (2) that as the deceased vendee could not make default, his representative had the usual period of six months for applying to be brought on to the record, the order of dismissal for default being inappropriate and inoperative as a bar.

[P 447 O 2]

*Hargopal*—for Appellant.*Cooper*—for Respondents.

**Judgment.**—This judgment will cover the connected Appeal No. 2805 of 1917. Jagat Ram plaintiff sued for pre-emption and the first Court passed a decree for possession on payment of a certain sum. Both plaintiff and the vendee lodged appeals. On 14th November 1916 the vendee's appeal was dismissed, as neither he nor his pleader was present.

On the same day the plaintiff lodged an application saying the vendee had died in October 1916 and that his son Daulat Rai should be brought on to the record as his representative. This was granted, and notice issued but was not served. Notice, again issued, and then the plaintiff's appeal was accepted ex parte on 9th January 1917, though notice to Daulat Rai had not yet returned and was afterwards received back unserved.

On 13th March 1917 Daulat Rai applied through Amir Chand, pleader, (1) for setting aside the ex parte decree and (2) for getting himself brought on to the record as appellant in his father's place. The District Judge holds that the former application is time-barred, and that the latter is futile as such an application can only apply to pending suits or appeals. The District Judge overlooks that where notice has not been served, limitation for an application for re-hearing the appeal dates from the time when the applicant had knowledge of the decree: see Art. 169. And as to the other application I need only refer to the Privy Council ruling *Debi Bakhsh Singh v. Habib Shah* (1), as authority for holding that a dead man is not a defaulter, and that in such a case the representative can get the usual period of six months for applying to be brought on to the record, the order of dismissal for default being inappropriate and inoperative as a bar. The District Judge also held that the applications had not been put in by a proper agent, but Lala Amir Chand was instructed by Naunidh Rai, who is Daulat Rai's general agent. I accept both these appeals, and set aside the orders under appeal and also the order of the District Judge, dated 14th November 1917, dismissing Jetha Nand's appeal and his order of 9th January 1917 accepting Jagat Ram's appeal.

The District Judge will first pass an order bringing Daula Rai on to the record as appellant in place of his deceased father, and will then hear both appeals and dispose of them on the merits.

Stamp on appeals to this Court to be refunded; other costs of appeal to this Court to be costs in the cause.

R.M./R.K.

*Appeal accepted.*

(1) [1913] 35 All. 831 = 16 O. C. 194 = 40 I. A. 150 = 19 I. C. 526 (P.C.).

**A. I. R. 1919 Lahore 447 (2)**

WILBERFORCE, J.

*Bajid*—Plaintiff—Appellant.

v.

*Mt. Satto and others*—Defendants—Respondents.

Second Appeal No. 564 of 1918, Decided on 22nd October 1918, from the decree of Dist. Judge, Lyallpur, D/- 17th January 1918.

**Husband and Wife—Restitution of conjugal Rights — Suit for — Disagreement between**



families of husband and wife is no ground for refusing relief.

A mere disagreement between the families of the husband and the wife is not by itself a sufficient cause for refusing relief to the husband in a suit for restitution of conjugal rights.

[P 448 C 2]

In a suit for restitution of conjugal rights it was found that the marriage had not been consummated, that there was bad feeling between the families of the husband and of the wife and that the wife refused to go to her husband at the dictation of her parents:

*Held:* that under these circumstances relief could not be refused to the plaintiff: 17 I. C. 254; 82 P. R. 1908 and 46 P. R. 1916, *Dist.*

[P 448 C 2]

*Ram Chand Manchanda*—for Appellant.

*Devi Dyal*—for Respondents.

**Judgment.**—In this case the District Judge of Lyallpur has accepted an appeal against the decision of the Subordinate Judge granting the plaintiff a decree for restitution of conjugal rights against Mt. Satto, his wife, and for an injunction against her father and mother. The District Judge held that two facts were established, viz., that the marriage had not been consummated, and that there was bad feeling between the two families, and in view of these facts and the judgments reported as *Kalawati v. Bukhan* (1), *Dhani v. Narain Singh* (2) and *Zaida v. Jowai* (3) he has considered that his discretion should be used in favour of the girl. It is argued before me that the District Judge has based his decision on judgments in noway relevant to the present case. It is pointed out that in *Zaida v. Jowai* (3) restitution was refused on account of eight years' desertion and the puberty of the girl coupled with nonconsummation of the marriage. In *Dhani v. Narain Singh* (2) the husband had been guilty of 16 years' desertion, and his object in suing for the return of an old woman suffering from goitre was merely to obtain possession of a marriageable daughter. In *Kalawati v. Bukhan* (1) the circumstances were also peculiar.

In the present case the marriage of Mt. Satto took place in exchange for the marriage of Mt. Jawai, the plaintiff's sister, with the paternal uncle of Mt. Satto. There have been disagreements between the plaintiff's sister and her husband, and Mt. Jowai has left her

husband's house. Probably on account of these disagreements a criminal charge was made by plaintiff's brother against two uncles of Mt. Satto. The charge may have been a true one but proceedings were dropped. The only other fact worthy of notice in the case is that the marriage took place in 1914 when the girl was 13 years of age. She was therefore 16 years of age in 1917, when this suit was instituted. Consummation of the marriage has also not taken place. It is also most significant that it is not even alleged that the plaintiff himself has figured in any family quarrel.

To the above circumstances, it is clear, the judgments referred to by the lower appellate Court have not the slightest application. It is also clear that the girl herself, who is not even acquainted with her husband, has no reasonable personal ground for refusing to live with him. She is merely acting at the dictation of her father and mother who are annoyed on account of events connected with Mt. Jowai. It is also obvious that the right of a husband to obtain the return of his wife would become a dead letter if relief were refused in a case of this description. Every case in which parents refuse to send the girl to her husband is due to some disagreements between the families and this by itself is no sufficient cause for refusing relief. For the above reasons I accept the appeal and give plaintiff a decree for the relief claimed against all the defendants.

R.M./R.K.

*Appeal accepted.*

### A. I. R. 1919 Lahore 448

BROADWAY, J.

*Ganesha Ram and others*—Defendants  
—Appellants.

v.

*Panju Singh and another*—Plaintiff  
and Defendant—Respondents.

Second Appeal No. 477 of 1918, Decided on 8th April 1918, from order of Dist. Judge, Lahore, D/- 21st December 1917.

Limitation Act (1908), Art. 141—~~Suit~~ by reversioner after widow's death—Article 141 applies and not Punjab Limitation (Ancestral Land Alienation) Act (1900), Art. 2.

A suit by a reversioner to recover possession of ancestral land after the death of the alienor's widow is governed by Art. 141, Lim. Act and not by the Punjab Limitation Act, even where the alienor died after the latter Act came into force, inasmuch as the reversioner could not sue

(1) [1912] 17 I. C. 254.  
(2) [1908] 82 P. R. 1908.  
(3) [1916] 46 P. R. 1916=34 I. C. 538.



for possession during the lifetime of the widow of the alienor. [P 449 C 1]

*Muhammad Shafi and Muhammad Rafi*—for Appellants.

*Amar Nath Chopra*—for Respondents.

**Judgment.**—The facts of the suit out of which this appeal has arisen are these: In 1899 Kishen Singh and Mahna Singh alienated certain lands in favour of Devi Das, etc. Kishen Singh died in March 1905 and was succeeded by his widow who however died in April 1906. In March 1917 Panju Singh, a reversioner, instituted a suit for possession of half of the land so alienated, the defendants being the descendants of Devi Das, etc. the original alienees. Panju Singh's suit was dismissed as barred by the Punjab Limitation Act 1 of 1900. On appeal the learned District Judge held that inasmuch as the reversioner could not sue for possession during the lifetime of the widow of the alienor, Art. 141, Lim. Act, applied and not the Punjab Limitation Act 1 of 1900, and that the suit was therefore within time. He accordingly remanded the case for decision on the merits.

Against this decision Ganesha Ram, Gopi Ram and Munshi Ram, the defendants, have preferred this appeal and on their behalf I have heard Mr. Shafi, while Lala Amar Nath Chopra has addressed me on behalf of Panju Singh. Mr. Shafi referred me to *Sahib Dad v. Rahmat* (1), *Rasul Bakhsh v. Nabi Bakhsh* (2), *Khiali Ram v. Gulab Khan* (3), *Miran Bakhsh v. Ahmad* (4), *Jiwana v. Abdullah* (5), *Sohnu v. Labha* (6) and *Bhagat Singh v. Sher Singh* (7). I have also consulted the unreported cases referred to in *Sohnu v. Labha* (6). These cases support the view expressed by the learned District Judge, and Mr. Shafi has sought to differentiate them by pointing out that in all of them the alienor had died before Act 1 of 1900 came into force. This was the precise line taken before the learned District Judge and after giving careful consideration to Mr. Shafi's argument I am of opinion that the view taken by the learned District Judge is correct. It is

(1) [1904] 90 P. R. 1904 (F.B.).

(2) [1906] 91 P. L. R. 1906.

(3) [1911] 88 P. R. 1911=11 I. O. 392.

(4) [1907] 145 P. R. 1907.

(5) [1909] 64 P. R. 1909=2 I. O. 962.

(6) [1910] 62 P. R. 1910=7 I. O. 476.

(7) A.I. R. 1914 Lah. 452=29 P. R. 1914=24 I. O. 212.

in consonance with *Miran Bakhsh v. Ahmad* (4), which decision has been referred to in most of the other cases cited with approval. Following that decision I dismiss this appeal with costs.

R.M./R.K.

*Appeal dismissed.*

### \* A. I. R. 1919 Lahore 449

LE ROSSIGNOL, J.

*Suraj Bhan*—Petitioner.

v.

*Emperor*—Opposite Party.

Criminal Revu. No. 319 of 1918, Decided on 6th April 1918, from order of Dist. Magistrate, Hissar, D/- 3 1-1918.

(a) Criminal P. C. (1898), S. 339—Trial of approver—Formal withdrawal of pardon is not necessary.

As a preliminary to the trial of an approver under S. 339 it is unnecessary that there should be a formal withdrawal of the pardon.

[P 450 C 1]

(b) Criminal P. C. (1898), S. 337—Approver should not screen his accomplices.

It is not sufficient for an approver to help to secure the conviction of some of his accomplices, if he has screened the others. [P 450 C 1]

\*(c) Criminal P. C. (1898), 337—Approver is not bound to disclose previous offence.

An approver in order to satisfy the conditions of his pardon is called upon to make a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence or offences which are being inquired into, and not relative to offences which are at the time not being inquired into. [P 450 C 2]

*Beechey and Ganpat Rai*—for Petitioner.

*C. Bevan Petman*—for the Crown.

**Judgment.**—In June or July 1917 it was ascertained that a sum of Rs. 53,000 had been withdrawn from the Hissar Treasury by means of forged vouchers and the police made inquiries into the offences, which were held to fall under Ss. 467/420, I. P. C.; suspicion fell upon the petitioner Suraj Bhan in connexion with those frauds and on 14th July 1917 the District Magistrate authorized the tender to him of a pardon on the usual conditions as set forth in S. 337, Criminal P. C. The tender was accepted by Suraj Bhan and he appeared as a witness for the prosecution against his accomplices, three of whom have been convicted. Subsequently it was ascertained by the police that Suraj Bhan had not made a full and true disclosure of the whole circumstances relative to those offences, and the District Magistrate has ordered his prosecution in accordance with the provisions of S. 339 of the Code in respect of the frauds.



He has petitioned this Court and on his behalf it has been contended that though with the sanction of this Court his prosecution on a charge of perjury might be legally instituted, the District Magistrate was not competent to withdraw the pardon and to direct his prosecution on charge of fraud. On behalf of the Crown it has been retorted that the application by the petitioner is clearly premature; that the pardon has not been withdrawn; and that the question whether the pardon has been forfeited is a matter for the decision of the Magistrate who will try the case. In the Code of 1872 the language used suggested that the proper procedure in a case of this kind was that the trial of the approver in respect of the original charge should be preceded by a formal withdrawal of the pardon and there are authorities to the effect that the order of withdrawal should issue from the Court which made the tender of pardon. The present law, however, is somewhat different and contains no reference to a withdrawal of the pardon and there are several authorities, of which it is necessary to mention only *Emperor v. Saber Akunji* (1) and *Sashi Rajanshi v. Emperor* (2), for the view that as a preliminary to the trial of the approver it is unnecessary that there should be any formal withdrawal of the pardon, so that in the present case the argument on behalf of the petitioner that the pardon has been withdrawn by an unauthorized Magistrate falls to the ground.

Next it is urged that the strictest faith should be kept with a person who has accepted a tender of pardon, who has appeared in the witness box on behalf of the prosecution and has secured the conviction or helped to secure the conviction of three of his accomplices. This argument assumes that the approver has fulfilled completely the conditions on which the tender of pardon was made. It is not sufficient for an approver to help to secure the conviction of three of his accomplices, if he has screened the fourth and it is precisely on the ground that the approver petitioner has screened one of his accomplices that the District Magistrate has ordered his prosecution. If

this is a correct view, the approver has not fulfilled completely the conditions of his pardon, and he therefore, has no reason to complain if that pardon is declared to be forfeited. The question, whether as a fact he has forfeited his pardon, is one which will have to be determined by the trial Magistrate who will have to place that issue in the forefront of the case. Another objection raised is that one of the grounds on which the District Magistrate is proceeding against the petitioner is that subsequent to the discovery of frauds amounting to Rs. 53,000 it was ascertained that at a still earlier date the approver had committed another fraud which was unknown to the police at the time when the pardon was tendered to him. The objection appears to me to have some force, for the approver in order to satisfy the conditions of his pardon was called upon to make a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence or offences which were then being inquired into, and not relative to offences which were at that time not being inquired into. On this point, however, I prefer not to pass any final decision, inasmuch as this too is a matter which the trial Magistrate should decide and also because the other grounds for prosecuting the petitioner are quite sufficient even if his failure to disclose the earlier offence be left out of the question. From the foregoing it appears that the District Magistrate's action was taken by him in his capacity as chief prosecuting agency of the district and as there is nothing illegal in the same, this Court has no power nor desire to interfere. The petition is consequently dismissed.

R M./R.K.

*Petition dismissed.***A. I. R. 1919 Lahore 450**

RATTIGAN, C. J. AND SHAH DIN, J.  
*Panna Lal*—Defendant—Appellant.

v.

*Marwar Bank Ltd. of Hissar, Ambala and others* — Plaintiffs and Defendants—Respondents.

First Appeal No. 2420 of 1913, Decided on 2nd April 1918, from decree of Dist Judge, Ambala, D/- 27th October 1913.

(a) Court-fees—Appeal—Separate appeals by several defendants—Court-fee payable is full amount by each.

Plaintiff Bank sued to recover the sum of Rs. 18,853-12-0 from the defendants, alleging

(1) [1915] 42 Cal. 756=27 I. C. 184=16 Cr. L. J. 120.

(2) [1915] 42 Cal. 856=26 I. C. 657=16 Cr. L. J. 65.



that defendant 3, a Company opened a current account with the plaintiff on 6th July 1908, agreeing to pay interest at the rate of Rs. 7-8 per cent per annum from the date of the account up to 14th October 1909 and thereafter at the rate of Rs 8-4 per cent per annum, that defendant 2 executed two promissory notes for Rupees 30,000 and Rs. 20,000 respectively in favour of the plaintiff by way of security for the overdraft allowed to defendant 3, and that defendants 1 and 2 in conjunction with one G executed a surety bond in favour of the plaintiff by which they agreed to act as sureties for the amount found due to the plaintiff from defendant 3 from time to time. The suit having been decreed, defendants 1 and 2 filed separate appeals in the Chief Court. Defendant 2 paid full ad valorem court fee and presented his appeal first, while defendant 1 stamped his memorandum of appeal with a court-fee of Rs. 2 only on the ground that the full court-fee had already been paid by defendant 2. It was contended, inter alia, that defendants 1 and 3 had executed the pro-notes as officers of defendant 3 and were not therefore personally liable on these documents and that in any event the promote jointly executed by defendants 1 and 2 was merely a contract of indemnity and that consequently until plaintiff had exhausted his remedies against the principal debtor, defendant 3 the suit against defendants 1 and 2 was premature:

*Held:* (1) that the defendants were entitled to file a joint appeal but as they had elected to present two entirely distinct and separate appeals each must pay the full amount of court-fee; (2) that the creditor was not bound to exhaust his remedies against the principal before suing the surety. 7 Bom. 146; 6 Bom. H. C. R. A. C. J. 241 and 4 M. H. C. R. 190, *Foll.*

[P 454 C 1; P 457 C 2]

(b) Contract Act (9 of 1872), S. 128—*Suit.*

A suit may be maintained against the surety though the principal had not been sued.

[P 457 C 2]

*Govind Das and Dhanpat Rai*—for Appellant.

*Moti Sagar, Mehta Bahdur Chand, C. Bevan Petman and K. Santanam*—for Respondents.

**Judgment.**—The plaintiff in this case is the Marwar Bank, Limited, with its head office at Hissar and a branch at Ambala City, and the defendants are: (1) Lala Basheshar Nath, son of Rai Damodar Das, Extra Assistant Commissioner, resident of Delhi City, Kashmiri Gate; (2) Lala Panna Lal, proprietor of the factory known as Upper India Glass Works, Ambala City and (3) The Luxmi Company, Limited, head office Ambala City. Plaintiff Bank sues to recover Rs. 18,853-12-0 from the defendants on the following allegations, as set forth in the plaint: (1) Defendant 3 noted in the heading, opened a current account with the plaintiff at Ambala on 6th July 1908, and in the course of the account the

plaintiff duly carried on dealings with the said defendant. Copy of the detailed account, which is duly verified, is attached to the petition of plaint; (2) defendant 3, above named, agreed to pay interest at the rate of Rs. 7-8 per cent. per annum from the date of the account up to 14th October 1909, and thereafter at the rate of Rs. 8-4 per cent. per annum; (3) on 16th August 1908 and 28th December 1908, defendant 2 executed two promissory notes for Rs. 30,000 and Rs. 20,000 respectively in favour of the plaintiff by way of surety for the overdraft allowed to defendant 3. On 28th December 1908 defendants 1 and 2 and Lala Ganga Ram executed a surety bond in favour of the plaintiff, under which both the said defendants and Lala Ganga Ram agreed to act as sureties for the amount found due to the plaintiff, from defendant 3 from time to time. The original promissory notes and the surety bond are attached to the petition of plaint; (4) defendant 3 has failed to pay the whole of the amount due by him in spite of repeated demands and has now gone into liquidation; (5) by virtue of both the promissory notes above mentioned defendant 2, and by virtue of surety bond, dated 28th December 1908, above referred to, defendants 1 and 2 are personally liable jointly and severally for the amount due from defendant 3; (6) of the sureties mentioned in para. 3 Lala Ganga Ram has paid the amount of Rs. 9,384-5-6 and the plaintiff now wishes to enforce his claim for the balance against defendants 1 and 2 jointly and severally as sureties for the liability of defendant 3; (7) defendants 1 and 2 have been repeatedly asked to pay the amount in question, but they have failed to do so. (8) the total amount in question, inclusive of interest due from the defendants after deducting the amount received from Lala Ganga Ram, is Rs. 18,853-12-0; (9) the cause of action accrued to the plaintiff on 20th March 1911, when he made a demand for the amount in question from the defendants and they did not pay the same. Copies of notice sent under registered covers, are attached to the petition of plaint.

The plaintiff therefore prays that (a) a decree for Rs. 18,853-12-0 may be passed with costs of the suit in his favour against defendants 1, 2 and 3. He also prays that the Court may pass an order for award of



interest at the rate of Rs. 8-4 per cent. per annum from the date of the suit up to the date of realization of the whole of the amount; (b) the Court may pass an order that defendants 1 and 2 are personally liable jointly and severally for the amount to be decreed by the Court against the defendants as prayed in Cl. (a); (c) any other relief to which the plaintiff may be considered entitled in view of the facts of the case may be granted to him against the defendants.

Defendant 1 in his written statement raised certain objections which are not material for the purposes of the present appeal, and upon the merits of the claim pleaded as follows: The account produced by the plaintiff is not correct. Besides this the sum of Rs. 9,585, hundis which Luxmi Company, defendant 3, sold to the plaintiff, was not given credit for. The ordinary rate of interest between the plaintiff and defendant 3 was Rs. 7-8-0 per cent. The defendant has no knowledge of anything beyond that. Defendant 1 has no knowledge of the promissory note, dated 10th August 1908, for Rs. 30,000. An agreement was made to open a separate account with the Luxmi Company, defendant 3. A letter, dated 28th December 1908, in regard to a separate debt amounting to Rs. 20,000 by current account relating to the Bombay branch was written by the said Company under the signature of defendant 2 and Lala Ganga Ram as Directors and defendant 1 as officer of the company, so that the promissory note, dated 28th December 1908, for Rs. 20,000 made over to the plaintiff with the above letter may cover the future dealings of the company and the Bank. This amount had no concern with the permanent loan of Rupees 30,000. The defendant signed the letter in the capacity of Managing Agent of the Bombay Branch. He never held the office of a Director of the Bank. The letter does not make him liable to pay the sum as surety or in any other capacity. The document was not a security bond. It has no concern with the promissory note, dated 16th August 1908, beyond the promissory note, dated 28th December 1908, for Rs. 20,000. The letter was written according to the practice of Banks, so that the promissory note, dated 28th December 1908, for Rs. 20,000 be treated as continuing security for the current dealing carried on by means of that pro-

missory-note. The amount raised as per separate account and covered by promissory note, dated 28th December 1908, had been repaid to the plaintiff. If there was another permanent loan due to the plaintiff from defendant 3, he (plaintiff) made negligence in realizing it before.

If Lala Ganga Ram had paid any amount to the plaintiff, his act is not binding upon defendants 1 and 2. Besides the plaintiff has no right to realize the money from defendants 1 and 2 jointly and severally. The defendants had been telling the plaintiff to recover the amount due to him from defendant 3. Defendant 1 is not liable for the same. The amount claimed is not just. It was the duty of the plaintiff to give credit for the amount received from the Luxmi Company towards the satisfaction of the current separate account which was opened by means of a promissory note for Rs. 20,000. Para. 12 of the plaint is denied. The plaintiff is not entitled to get any relief, nor is he entitled to get any future interest. The amount of hundis sold and given to the plaintiff by the Luxmi Company ought to have been given credit for in the amount claimed. The plaintiff can in no way sue defendants 1 and 2 unless he fails to realize the debt from defendant 3. The plaintiff has shown gross negligence in recovering his dues from the Luxmi Company when the Luxmi Company executed a mortgage-deed in favour of the plaintiff and sent the same to him he refused to take it. If the said agreement created any personal liability against defendant 1, it has been extinguished on account of the acts of the plaintiff. The plaintiff's claim should be dismissed with costs. The defendant is entitled to get his costs. The defendant company admitted having opened a current account with the plaintiff as alleged, but pleaded that plaintiff should have given credit for a sum of Rs. 9,385 (apparently a mistake for Rs. 9,585) on account of hundis which were left with the plaintiff; that the defendant company did not agree to pay interest at the rate of Rs. 8-4-0 per cent, but only at the rate of Rs. 7-8-0 per cent. per annum; that many payments made to the plaintiff Bank are omitted from the accounts in addition to the aforesaid sum of Rs. 9,385; that the defendant company executed and offered to the plaintiff Bank a deed of hypothecation of certain debts



amounting to Rs. 31,115 in settlement of plaintiff's claim; that the amount claimed in para. 8 of the plaint is incorrect; that no demand was ever made from the defendant-company and that on the contrary the defendant company paid about Rs. 6,000 after the date specified in para. 9 of the plaint; and that the defendant company was in liquidation and could not be sued without due sanction.

Defendant 2, Lala Panna Lal, in his written statement admitted that the defendant-company had dealings with the plaintiff Bank and that interest was to be paid at the rate of Rs. 7-8-0 per cent. per annum, but he urged that he executed the promissory notes of 16th August and 28th December 1908 not as a surety but merely as an officer of the defendant-company and that he was not personally liable thereon; that the document, dated 28th December 1908, which was executed by himself, defendant 1 and Lala Ganga Ram, was not a security bond nor did it create any personal liability on the part of the executants; that the said document was executed by the defendant company under signatures of defendants 1 and 2 and Lala Ganga Ram as its directors and that it was made over to the plaintiff Bank upon the understanding that it should be considered as covering future current dealings between the Bank and the defendant-company and that he had no concern with the debt amounting to Rs. 30,000; that he defendant 2, was not personally liable upon any of the documents executed by him; that he had not been repeatedly asked to pay the debt but had received one notice only from the plaintiff Bank's pleader; that whatever cause of action the plaintiff Bank had was against the defendant company alone, and that it could if necessary recover from that company whatever may be due after adjustment of accounts: that plaintiff was bound to give credit for the sum of Rs. 9,385 which plaintiff Bank received on account of hundis from defendant-company; that the defendant company never denied the plaintiff's debt but on the contrary paid about Rs. 6,000 to the plaintiff Bank after 20th March 1911; that if the document dated 28th December 1908 be held to be a security bond, defendant 2 would be liable to pay only such sum as was raised by the defendant company from the plaintiff Bank after the date of the execution

of the said document; and that in any event the plaintiff Bank must recover first from the defendant company and can only sue defendant 2 for such amount as may be due after realizations had been made from the defendant company.

On the pleadings ten issues were drawn by the Court but of these only eight need to be considered upon this appeal. These eight are as follows:

1. Is the amount of Rs. 18,853 due from the Laxmi company? 2. Whether there was any subsequent agreement to raise the interest from  $7\frac{1}{2}$  per cent. to  $8\frac{1}{4}$  per cent.? 3. Whether the defendants are estopped from contesting the enhanced rate of interest on account of their having admitted the same as correct by accepting the statements of account as correct? 4. Whether certain hundis which were sent by the Laxmi Company to the plaintiff were dishonoured by the drawees and was the Laxmi Company informed? 5. If so are the defendants entitled to have the amount of these hundis credited to their account and if so to what amount? 6. Whether the promissory-notes and document, dated 28th December 1908 sued upon make defendants 1 and 2 personally liable as sureties, and if so to what extent? 7. If issue 6 is proved in favour of plaintiff, are defendants 1 and 2 entitled to have the decree made conditional on the plaintiff's first realizing the amount thereof from defendant 3 before proceeding against defendants 1 and 2? 8. Has the plaintiff not shown due diligence in the recovery of his money from the Laxmi Company, and are the sureties therefore discharged? The District Judge's findings upon these issues are as follows:

*Issue 1.* That the accounts of the plaintiff Bank are correct and that the amount claimed is the balance due to the plaintiff Bank upon the allegations made in the plaint. *Issue 2.* That it is proved that the rate of interest was raised on 15th October 1909 to  $8\frac{1}{4}$  per cent with the concurrence of the defendant company. *Issues 4 and 5.* That the hundis were dishonoured by the drawees after the Bank had made every reasonable effort to realize on them, that the defendant company was informed of the fact and that the defendants were not entitled to have the hundis credited to their account. *Issue 6.* That defendant 2 was



personally liable on the promissory notes Ex. P-52 and Ex. P-53, that defendants 1 and 2 were also personally liable on the agreement Ex. P-54 to the extent of Rs. 50,000 therein specified. *Issue 7.* That defendants 1 and 2 were not entitled to have the decree made conditional on plaintiff's first realizing from defendant 3, inasmuch as under S. 128, Contract Act, the liability of the sureties was co-extensive with that of the principal debtor in the absence of any provision in the contract to the contrary. *Issue 9.* That the plaintiff Bank were entitled to refuse to accept a mortgage-deed which the defendant company tendered to them on 16th December 1910, inasmuch as if the plaintiff Bank had accepted the mortgage, they would thereby have entered into a fresh contract with the principal debtor and the sureties would have been released under S. 134, Contract Act. The learned Judge accordingly granted the plaintiff a decree for the amount claimed with costs and interest at 8 1/4 per cent up to the date of realization.

Defendants 1 and 2 have appealed to this Court separately, the appeal of defendant 2 being presented on 27th November 1913 and that of defendant 1 on 5th January 1914. The amount of court-fee on the first appeal, Rs. 745, has been paid by defendant 2, and defendant 1 has stamped his memorandum of appeal with a court-fee of Rs. 2 only, on the ground that the full court-fee has been paid already by defendant 2. Mr. Moti Sagar for the respondent Bank urged as a preliminary objection that the full court-fee should be paid on both the appeals, and after hearing Mr. Petman on this point we accept the contention. Defendants were entitled no doubt, had they so desired, to file a joint appeal, but as they have elected to present two entirely distinct and separate appeals, we can find no provision of law which would exempt the memorandum filed at the later date from bearing the full amount of court-fee. We accordingly directed that the deficiency should be made good within a week from 20th March 1918 and Mr. Santanam on behalf of defendant 1 undertook that this should be done. Upon this undertaking we proceeded to hear the arguments. On behalf of the appellant it has been urged: (1) that defendant 2 executed the promissory notes P-52 and P-53 and defendants 1 and 2 exe-

cuted the document P-54 merely as officers of the Laxmi Company and that neither of them is liable personally on those documents; (2) that in any event P-54 is merely a contract of indemnity and that consequently until plaintiff has exhausted his remedies against the principal debtor, the Laxmi Company, the suit against defendants 1 and 2 is premature; (3) that if it be held that defendants 1 and 2 are liable on the said documents, they are liable merely as sureties and only to the extent of Rs. 20,000, inasmuch as that was the amount due on promissory-note referred to in para. 1, Ex. P-54, the reference to Rs. 50,000 in the same paragraph being an error; (4) that the liability on P-54 is in any case not joint and several and the plaintiff by accepting payment of Rs. 9,384.5-6 from Lala Ganga Ram has thereby released Ganga Ram's sureties; (5) that the variation in the terms of the contract as to the amount of interest payable by the defendant Company, having been made without the consent of defendants 1 and 2, releases them from all liability in respect of the contract, inasmuch as it amounts to granting time to the defendant company; and that in any event defendants 1 and 2 are not liable to pay interest at the enhanced rate of 8 1/4 per cent; (6) that the plaintiff was guilty of negligence in not realizing the amount of Rs. 9,585 due on the hundis which had been deposited with the plaintiff as security for the loan, and that consequently that amount must be deducted from any amount found to be due to plaintiff from the defendants; (7) that the plaintiff was not justified in refusing to accept the hypothecation deed, dated 19th December 1910 (Exhibit P. W. 1-I, p. 67 of the printed paperbook), which had been offered to the plaintiff by the defendant Company; and (8) that interest from the date of suit to the date of realization, if allowed at all, should have been allowed at the ordinary Court rate of 6 per cent. per annum and not at the rate of 8 1/4 per cent.

Elaborate arguments in support of these various contentions were addressed to us by Messrs. Petman, Govind Das and Santanam, and they were discussed and criticised in detail by Mr. Moti Sagar in reply. We now proceed to deal with them seriatim, though the first three can conveniently be discussed



together. The Laxmi Company, Limited, appears to have started in Ambala in 1907 for the purpose of doing business there and in Bombay and Delhi as "Bankers, Cotton Merchants and General Commission Agent," and upon the Board of Directors were (inter alia) Lala Panna Lal, Lala Ganga Ram and Lala Ram Saran Das. Lala Panna Lal is defendant 2 in this case; and according to Mr. Petman, Lala Basheshar Nath, defendant 1, was an "alternate Director" with his uncle Lala Ram Saran Das, and it is for this reason that his name is coupled with that of his uncle at the foot of the balance sheet printed at pp. 7 and 8 of the paper-book. Both Lala Basheshar Nath and the respondent Bank were agreed upon this point at the hearing of the appeal before us. Lala Panna Lal, Lala Ganga Ram and Lala Ram Saran Das were also Directors of the respondent Bank.

In May 1908 the Laxmi Company opened a floating account with the respondent Bank's City Branch with a credit of Rs. 1,000 (see p. 82), but it seems to have been early realized that the Company needed money to develop its business, and it is not surprising, in view of the composition of the directorate of the two concerns, to find that in July 1908 the respondent Bank advanced Rs. 28,000 to the Company (see p. 46). This loan was understood to be one of Rs. 30,000, (Rs. 2,000 being taken in advance as interest), but at first it was covered by no security. On 16th August 1908, however this defect was remedied by Lala Panna Lal executing a pro-note (p. 52) for Rs. 30,000 in favour of the Bank. It seems that the Company stood in need of further assistance from the Bank, and apparently approached the Bank for that purpose, for on 13th September 1908 at a meeting of the Bank's Managing Committee, consisting of Rai Bahadur Lala Ganga Ram, C. I. E., Lala Ganga Ram, Lala Panna Lal and Lala Kidar Nath, a resolution was passed to the following effect:

"Resolved that a standing loan up to Rs. 50,000 be given to the Laxmi Company on the personal guarantee of the three Directors: (1) Lala Panna Lal, (2) Lala Ganga Ram, (3) Lala Ram Saran Das, on the following terms: (A) Rs. 30,000 will be a standing loan carrying interest at 7½ per cent. per annum all the year round. The Laxmi Company may draw Rs. 20,000 by usance hundis not exceeding Rs. 5,000 each and there should be an interval

of a week between each and every drawing. These hundis will be accepted by the Bank on presentation, and if the Laxmi Committee wants to have these hundis paid on due date it will give at least two weeks' notice to the Bank without sending remittance, or— The Laxmi Company may draw to the extent of Rs. 20,000 by giving one month's previous notice by demand drafts. (B) The Directors of the Laxmi Company should give an indemnity bond undertaking to satisfy all claims of the bank in the event of the company failing to meet its liabilities."

On 28th December 1908 Lala Panna Lal executed a second pronote (Ex. P-53) for the sum of Rs. 20,000 for value received for amounts overdrawn with interest thereon, at the rate of seven and a half per cent. per annum from this date to date of payment in full. Both the pronote Ex. P-52 and the pronote Ex. P-53 were signed by Lala Panna Lal as "Managing Director, Laxmi Company Limited, Ambala City," and it is common ground that the consideration for the two pronotes was the money advanced to the Laxmi Company and that Lala Panna Lal had no personal account of his own with the respondent Bank. On the same date that Ex. P-53 was executed, a document (Ex. P-54, p. 45) was executed in favour of the respondent Bank by Basheshar Nath, Panna Lal and Ganga Ram, whose signatures are bracketed together with the words "Directors" against them. This document runs as follows:

"The Manager,  
The Marwar Bank, Limited,  
Ambala City."

Dear Sir,

In consideration of your allowing the Laxmi Company, Limited, to overdraw sums not exceeding in the aggregate Rs. 50,000 (fifty thousand only), on the security of Laxmi Company, Limited, demand pronote in your favour of date we hereby pledge for the re-payment on demand of the said overdraft together with interest thereon and of any other sum or sums of money which may be or become due to you from the Laxmi Company, Limited, on any account whatsoever during the continuance of this pronote. And we hereby declare and agree that the overdraft allowed and intended to be secured by this agreement shall be taken to have been allowed by you entirely upon the faith of and relying upon the declaration signed by us at the foot hereof, which declaration solemnly we declare to be true in every respect. It is hereby further agreed and declared that these presents shall remain and be a continuing security to you for the balance of the said account for the time being to the extent aforesaid, notwithstanding that at any time or times the balance of the said account may be in your favour, it being expressly intended that these presents shall be a security for the balance of the said account due by the Laxmi Company, Limited, to you while the said account shall continue open. Signed at Ambala City this 28th



day of December in the year one thousand nine hundred and eight.

We are,  
Yours faithfully,

Basheshar Nath  
Panna Lal  
Ganga Ram

} Directors."

Such then in brief are the facts as they existed at the time when the three documents Exs. P-52, 53 and 54 were executed and in endeavouring to interpret these documents, we consider we are entitled to keep those facts in mind [S. 92, proviso (6), Evidence Act, 1872]. In our opinion regard being had to the admission of the parties and to all the circumstances the two pronotes Exs. P-52 and P-53 must be held to have been executed by Lala Panna Lal in his capacity as Managing Director of the Laxmi Company for and on behalf of the said company, and in respect of them he himself incurred no liability either personally or as a surety, and the Laxmi Company alone is liable thereon. As regards Ex. P-54 however our conclusions are different. It is evident from the resolution of 13th September 1908 (Ex. P-46) that the Directors of the Bank realised the necessity of having some further security than the pronote Ex. P-52 which had been executed on behalf of the company by Lala Panna Lal on the 16th August, especially if further advances to the limit of Rs. 50,000 were to be made from time to time to the Company and that they had decided that the form which any such further security should take was to be a personal guarantee by the then Directors of Company, Lala Panna Lal, Lala Ganga Ram and Lala Ram Saran Das, of whom the last mentioned represented Lala Basheshar Nath, his nephew no less than himself. The necessity for this further security would certainly not become less urgent as the year drew to its close and the time for audit of the bank's books approached. It was in these circumstances that Ex. P-54 came to be executed. Prima facie therefore we would expect to find the Bank when fresh documents are being executed, insisting on the Directors of the Company complying with the terms of the resolution passed in September 1908 and we have now to look to Ex. P-54 to see if it is in terms the guarantee which it is claimed to be by the bank. Unfortunately (and probably for the sake of saving a lawyer's fee) the bank decided to adopt a form of

security bond which was one of their stock forms and used by customers who wished to overdraw accounts from time to time (see Ex. P-60).

As a result of this false economy this playing with dangerous legal instruments without understanding the real meaning of the terms employed, the bank has been involved in costly litigation, for it is hardly too much to say that the present claim would probably never have been disputed by defendants 1 and 2, had not the person who adopted the form slavishly copied out the words "demand pronote in your favour of date" after the words "Laxmi Company, Limited," in para. 1, Ex. P-54. Despite the confusion caused by this carelessness (for such we must consider), the general tenor of the document appears to be clear enough. The opening words;

"In consideration of your allowing the Laxmi Company, Limited, to overdraw sums not exceeding in the aggregate of Rs. 50,000"

must mean that the principal debtor is the company and that the executants of the document are the guarantors for the repayment of all sums overdrawn or due by the company to the specified limit of Rs. 50,000. In other words, the agreement is a contract of continuing guarantee within the meaning and for the purposes of Ss. 126, 128 and 129, Contract Act, and that it is not (as contended by defendants 1 and 2) merely an agreement by the company itself through its Directors is obvious not only from the terms of the document to which we have referred but also from the fact that it was executed, unlike Exs. P-52 and P-53 by three Directors and not one, whereas had it been a contract on behalf of the company the signature of one Director would have been as sufficient for its due execution as it was for the execution of the two pronotes. Moreover it is a fact of some significance, and throws considerable light on the real meaning of the executants, that one of them, Lala Ganga Ram, has admitted his personal liability thereunder and paid up the one-third share, namely, Rs. 9,384 due from him under the contract. Mr. Petman contended that the liability of the executants could not in any event extend beyond the amount of the pronote Ex. P-53, inasmuch as that was the pronote referred to in para. 1 of this document. We cannot agree with him as we



are satisfied that the words "demand pro-note in your favour of date" were by mistake copied from the form which served as a precedent for this document whereas the amount which the company were to be at liberty to overdraw up to has been rightly stated in the same paragraph as being Rs. 50,000. Nor can we agree with the argument that there were two wholly independent accounts between the Laxmi Company and the respondent Bank, the one being "the pro-note account of Rs. 30,000" covered by Ex. P-52 and the other "a floating account" to which P-53 and P-54 referred. Originally no doubt two accounts appear to have been kept up by the bank, but this was due to the fact that the Rs. 30,000 had been advanced by the Cantonment Branch of the bank, whereas the smaller current account which opened in May 1908 was with the City Branch of the bank. In October 1908 the amount then due to the Cantonment Branch was transferred to the City Branch, and that this was done to the knowledge of the defendants is clear from Ex. D-3 (p. 71), which is a statement of account submitted by the bank to the Laxmi Company and filed by defendants. Thereafter the accounts were all kept by the City Branch and though there is a certain amount of confusion, inasmuch as the accounts which commence at p. 82 of the paper-book were allowed to continue up to December 1909 *pari passu* with the account set forth at pp. 48-57, it is clear that the accounts were those of the company alone and that the amounts due on the pro-note and the sums drawn by the company from the Bank and payments made from time to time by the company to the bank were all treated as being on the same footing. There is no doubt moreover that the accounts were consolidated in December 1909 and thereafter continued as set forth at pp. 48 et seq. It is alleged that this was done without the knowledge of defendants 1 and 2. But it is clear from the correspondence on the record that statements of accounts were duly submitted from time to time by the bank to the company (e.g., see Exs. P-2 and P-3) and we have no reason to suppose that the directors of the company, or in other words, the defendants, were unaware of what was being done.

We hold then that defendants 1 and 2

are personally liable under Ex. P-54 for sums due by the company to the respondent bank within the margin of Rs. 50,000 and as no attempt has been made to impugn the accuracy of the various items set forth in the accounts filed by the bank, we must further hold that the amount claimed, namely, Rs. 18,853 12 0 is correct. As regards the arguments that the plaintiff cannot sue defendants 1 and 2 until they have first sued the defendant company, the principal debtor, and have failed to realise from the latter it is only necessary to refer to *Sankana Kalana v. Virupakashapa Ganeshapa* (1), *Lachhman Joharimal v. Bapu Kandu* (2) and *Totakot Shanguuni Menon v. Kurusingal Kaku Varid* (3) as sufficient authority for the proposition that in a case of this kind, the creditor is not bound to exhaust his remedy against the principal before suing the surety and that a suit may be maintained against the surety though the principal has not been sued.

The fourth contention is not tenable upon the terms of Ex. P-54, as the obligation thereunder is clearly joint and several. Accordingly plaintiff by accepting payment of his one-third share from Lala Ganga Ram cannot be held to have released the co-sureties.

As regards the fifth contention, viz., that a variation was made in the terms of the contract when the rate of interest was enhanced from seven and a half to eight and one-fourth per cent, and that such variation being without the consent or knowledge of defendants 1 and 2 released them from their contract, or at all events did not render them liable to pay interest at a rate other than that originally agreed upon, we are unable to accept the argument, as we are satisfied upon the evidence that defendants 1 and 2 must have had knowledge of the variation in question. Admittedly the bank gave due notice of their intention to enhance the rate to the Laxmi Company (see Ex. P. 5, D-12 and P 6) and we cannot believe that the directors of the Laxmi Company were altogether in the dark upon this point. According to Wadhawa Singh P. W. 6, the liquidator of the Laxmi Company, Ex. P-63, which will be found at p. 66 of the printed

(1) [1888] 7 Bom. 146.

(2) [1869] 6 Bom. H. C. R. A. C. J. 241.

(3) [1868-69] 4 M. H. C. R. 190.



record, was filed by himself and Lala Panna Lal in the Court of the District Judge at Ambala in connexion with the liquidation proceedings, and upon this exhibit there is a "note" that interest at eight and a quarter per cent, is to be included from 1st January 1912 on the balance of Rs. 26,000-9-4 due to the bank. This again shows that defendant 2 at all events was well aware that enhanced interest was being charged, and in addition to this we have the significant fact that neither defendant 1 nor defendant 2 went into the witness-box to swear that that they had no knowledge of the agreement between the company and the bank.

In the sixth place it is contended that the bank were negligent in realizing an amount of Rs. 9,585-0-0 due on certain hundis which had been sent to them by the Laxmi company as security for the money due to the bank and that consequently the said amount must be deducted from any sum found to be due to the bank. It is not specified in the pleadings what particular hundis are referred to in this connexion, but apparently they are the five set forth in Ex. D-15 at p. 80 of the paper-book. The District Judge has found that the bank made every reasonable effort to realise the hundis in their possession and that on their failure to do so, they brought the matter to the notice of the company and were told on more than one occasion to hold up the hundis for the time being. This finding is supported by various documents on the record (see Ex. P-32, 33, 35, 36, 37, 38, 40, 41 and 44). In face of this evidence we cannot agree that the bank showed negligence in the matter of realising the hundis and that they are therefore liable to make good to the company any loss that may have been sustained by reason of the hundis being now time-barred.

We know of no authority in support of the argument that the plaintiff bank was bound to accept the hypothecation of certain supplementary securities which the company offered the bank in December 1910 (see Ex. P. W. 1 at p. 67); or that their refusal to accept such hypothecation debars them from claiming relief against the sureties. Finally there is the question of the interest to be allowed from date of suit to date of

realization. The District Judge has granted this at the contract rate of eight and a quarter per cent, per annum and we are unable to hold that he acted unreasonably in so doing. The rate is not unduly high and it must be remembered that the bank has been deprived of its money for some considerable time. Before concluding we would advert briefly to Mr. Petman's request that we should remand the case in order to enable defendants to call evidence to prove that Ex. P-54 has a well understood meaning in banking circles and that the form in which the contract of 28th December 1908 was embodied was one employed by the customer of a bank who wishes to be allowed to overdraw his account from time to time. We find it unnecessary to accede to this prayer as it is, in our opinion, the duty of the Court to construe a written contract of this kind for itself, and we are unable to see how the evidence of the bankers and bankers' clerks could be relevant to, or indeed of any material assistance in the interpretation of an agreement in writing which is clear enough so far as its language is concerned. The result is that we dismiss both the appeals with costs.

R.M./R.K. *Appeals dismissed.*

### A. I. R. 1919 Lahore 458

SHADI LAL, J.

*Ahmad and others*—Convicts—Petitioners.

v.

*Emperor*—Opposite Party.

Criminal Petn. No. 1031 of 1919, Decided on 31st October 1919, against order of Sess. Judge, Lyallpur, D/- 26th June 1919.

Penal Code (1860), Ss. 97, 149 and 325—Right of private defence of property—Right exceeded—No unlawful assembly held formed—Person actually causing grievous hurt could only be convicted.

Accused, six in number, caused grievous hurt to a person while acting in the exercise of the right of private defence of property. It was found that they had exceeded that right:

*Held*: (1) that it could not be held that all the accused constituted an unlawful assembly; (2) that the only person who could be convicted was the one who actually caused the grievous hurt. [P 459 C 1]

*Muhammad Iqbal*—for Petitioners.

*D. C. Ralli*—for the Crown.

**Judgment.**—The learned Sessions Judge finds that the complainant's party had no right to seize the cattle of the accused after the cattle had left the field.



and that the accused were consequently entitled to the right of private defence of property. But the learned Judge holds that the accused exceeded their right of private defence. Now on these findings it cannot be held that all the accused constituted an unlawful assembly and the only person who can be convicted is the one who actually inflicted the mortal wound on Mian Khan and thus exceeded his right of private defence: vide *Mihan Singh v. Emperor* (1). The evidence shows that that person was Ahmi. In view of the findings of the lower appellate Court referred to above, I am constrained to hold that no person other than Ahmi can be held to be guilty. I accordingly accept the application for revision and acquit all the petitioners, except Ahmi, whose conviction is altered to one under S. 325, I. P. C. The sentence imposed upon him by the Courts below is upheld.

R.M./R.K. *Petition partly accepted.*

(1) A. I. R. 1914 Lah. 557=26 R. R. 1914 Cr. =26 I. C. 652.

### A. I. R. 1919 Lahore 459

SHADI LAL AND MARTINEAU, JJ.

*Balwant Singh and another*—Convicts—Appellants.

v.

*Emperor*—Opposite Party.

Criminal Appeal No. 142 of 1918, Decided on 3rd July 1918, from order of Sess. Judge, Ferozepore, D/- 24th January 1918.

(a) Criminal P. C. (5 of 1898), S. 82—Territorial jurisdiction of British Courts—Subject of Native State cannot be tried for abetting within State for offence committed within British India—Arrest by British police of subject of Patiala State on Railway lines within Patiala Territory is valid—Penal Code, S. 4.

Where a subject of a Native State is charged with abetting an offence committed in British India and the alleged abetment consists entirely of what the accused did or said at a place within the State territory, he cannot be tried in a Court in British India for such abetment. *Reg. v. Pirtai*, 10 B. H. C. R. 356 Foll; 36 Bom. 524, Dist. [P 464 C 1]

The accused, a subject of the Patiala State, was arrested in a Railway carriage at Bhatinda by the British Police.

*Held*: that the arrest was lawful as full and exclusive power and jurisdiction of every kind over the Railway lines and over all persons within those lines had been ceded by the Patiala State to the British Government. 25 Cal. 20 (P. C.), Dist. [P 464 C 1]

(b) Evidence Act (1 of 1872), Ss. 144 Illus. (b), and 133—Value of approver's evidence—Corroboration is necessary.

An approver giving his evidence under a promise of pardon cannot be believed unless he is corroborated by independent evidence.

[P 461 C 1]

*Beechey and Gulam Rasul* for *Kehr Singh*—for Appellants.

*Mul Chand*—for the Crown.

**Judgment.**—Gajjan Singh, Arjan Singh and Mahla Singh have been convicted under Ss. 302/149, I. P. C., of having murdered Santa Singh and Nathal, residents of Dina in the Ferozepore District, and under S. 395, I. P. C., of having committed dacoities at the houses of Santa Singh, Banta Singh and Kala Singh, and Balwant Singh and Jot Ram have been convicted of abetting those offences. All the convicts have been sentenced to death. They have appealed, and the case is also before us under S. 374, Criminal P. C., for confirmation of the sentences. The offences were committed at Dina at about midday on 18th September 1916, Gajjan Singh, Arjan Singh and Mahla Singh are residents of Khota, a village about 5 kos from Dina, and are said to have joined with Bhanga Singh and his brother Ganda Singh, residents of Dina, in committing the offences. The deceased Santa Singh and Nathal were descendants of Baja, a great uncle of Bhanga Singh and Ganda Singh, and there was, as the learned Sessions Judge has shown bitter enmity between Bhanga Singh and Ganda Singh on the one hand and Santa Singh and his brother Banta Singh on the other. There is also evidence that Gajjan Singh, Arjan Singh and Mahla Singh were associates of Bhanga Singh and Ganda Singh, and that Gajjan Singh and Arjan Singh used often to go to Dina.

On the morning of 18th September 1916 Sucha Singh P. W. 34, lambardar of Khota, saw Gajjan Singh, Arjan Singh and Mahla Singh leaving the village and going towards Pattoke, which is in the direction of Dina. Gajjan Singh had a gun and the other two had chhavis. Mahla Singh, who was under orders of internment in his village, called out to Sucha Singh to report to Kirpal Singh lambardar that he was going away and would not return. The witness informed Kirpal Singh P. W. 35 who on the same morning made a report P. D. at the thana. Thakur Singh, P. W. 27, says he



saw Gajjan Singh, Arjan Singh and Mahla Singh going from Pattoke to Dina armed in the manner described by Suchu Singh. Sub-Inspector Lehna Singh, P. W. 54, on receiving Kirpal Singh's report went to Khota and thence to Pattoke and from there towards Dina. But on the way he was met by a lambardar and chaukidar of Dina, who told him that murders and dacoities had taken place. He sent reports P-E and P-U to the thana in which he stated that the offences had been committed by Ganda Singh, Bhanga Singh and three Jats of Khota. The dacoits on assembling in Dina had first tried to catch Santa Singh's son Bakhtawar Singh, who however succeeded in escaping. They then went into Nathal's house, killed Santa Singh who was in a room in the house with chhavis and shot dead Nathal who was in the verandah. They went after Banta Singh but he escaped and hid in a field. After this they looted the houses of Santa Singh, Banta Singh and Kala Singh. Finally Mt. Kishni the sister of Bhanga Singh and Ganda Singh told her brothers that they should kill her. A funeral pyre was prepared on which she lay down and then her brothers shot her and set fire to the pyre. The dacoits absconded after the commission of these crimes and it was not till the following May that Gajjan Singh, Arjan Singh and Mahla Singh were arrested while Bhanga Singh and Ganda Singh are still at large.

The evidence shows that at the time of the murders and dacoities Ganda Singh was armed with a gun Bhanga Singh with a revolver and Gajjan Singh, Arjan Singh and Mahla Singh with chhavis and a stick. That there were the five men who committed the crimes is proved by the evidence of P. Ws. 6, 7, 8, 9, 10, 12, 15, 17, 19, 29, 30 and 45, who saw them while the events described above were taking place. All five were known already to P. Ws. 6, 10, 15, 19 and 45, and all but Mahla Singh were known to P. Ws. 7 and 30. The evidence of Sub-Inspector Lala Ram Das, P. W. 59, also shows that Gajjan Singh, Arjan Singh and Mahla Singh were identified out of a number of other men by P. Ws. 6, 7, 8, 10, 12, 29 and 30.

In addition to the evidence of the Dina witnesses and of Sucha Singh, Kirpal Singh and Thakur Singh and the report P. D. mentioned above, it is pro-

ved that some gold earrings P. 58 of which Banta Singh's wife Mt. Atri, P. W. 11, was robbed, were pawned by Gajjan Singh who was accompanied by Arjan Singh, Mahla Singh and two other men to Mt. Sham Kaur, P. W. 37, and that the latter's husband Jamna Das, P. W. 38, pawned them to Sardha Ram, P. W. 40, from whom the police recovered them. It is further shown that Gajjan Singh came with Arjan Singh, Mahla Singh and two other men to Badan Singh, P. W. 42, and pawned to him some jewelry P. 52 to P. 57, which is part of that of which Mt. Atri was robbed. No evidence has been produced by Gajjan Singh, Mahla Singh and Arjan Singh and the prosecution evidence mentioned above establishes their guilt beyond all doubt. We confirm the sentences of death passed on them and dismiss their appeals.

We have now to consider the case of Balwant Singh and Jot Ram, who live in Patiala State at the villages of Chukerian and Mansa respectively, which are said to be some 60 miles from Dina. The learned Sessions Judge says that the case against these men is that they assisted Bhanga Singh and his companions in procuring arms with the object of removing some enemy or enemies of their own after Bhanga Singh and his party had murdered their enemies. This however is not a correct statement of the case. What Balwant Singh and Jot Ram have been charged with and convicted of is abetment of the murders committed at Dina (i. e., the murders of Bhanga Singh's enemies) and of the dacoities committed there and not abetment of the murder of their own enemies. The case for the prosecution against Balwant Singh and Jot Ram is what the learned Judge mentions as an alternative case, namely, that they assisted in supplying arms to Bhanga Singh and his friends with the knowledge that these arms would be used for murderous purposes and that in this way they are guilty of having abetted the crimes committed at Dina.

The case against Balwant Singh and Jot Ram rests on the statements of Narsing (P. W. 5), a resident of Dumwali in the Patiala State and of Fateh Muhammad (P. W. 67), a dealer in arms in Delhi. The evidence of these two witnesses was obtained as the result of information given by Gajjan Singh's



brother-in-law Gurdit Singh (P. W. 4), who on 20th April 1917 told the Deputy Superintendent of Police about the dacoits having obtained arms from Fateh Muhammad in Delhi.

The Deputy Superintendent of Police on receipt of that information got Gurdit Singh to write a letter to Fateh Muhammad. Fateh Muhammad sent a reply Ex. P-A, in which the name of Balwant Singh occurs. Fateh Muhammad's house was searched and in a register in the house the names and addresses of Jot Ram and Narsing were given. A pardon was tendered to Narsing, and his statement was taken by the Magistrate on 27th June. Fateh Muhammad was also tendered a pardon in respect of offences under the Arms Act.

Balwant Singh and Jot Ram are first mentioned by Narsingh in his evidence in connexion with an incident which is said to have occurred at Bhatinda about May 1916. Narsingh wanted a gun for use against his half brother Atma Singh with whom he had enmity, and Ganda Singh, with whom Narsingh became acquainted, wanted a revolver for dealing with his enemies at Dina. Narsingh says that they were unable to obtain the arms at Patiala and that then he and Bhanga Singh, whom he had met at Dina, started to go to Mansa where Bhanga Singh intended to see Jot Ram. They had to change trains at Bhatinda and happened to meet Balwant Singh and Jot Ram at the hotel there. Narsingh stayed outside the hotel, and Bhanga Singh went in to speak to them and then came and told Narsingh that Jot Ram had said that he would supply arms if he (Bhanga Singh) would murder the enemies of Jot Ram and Balwant Singh, and that Jot Ram and Balwant Singh would also pay him Rs. 1,000. This accidental meeting with Balwant Singh and Jot Ram is somewhat curious. There is no corroboration of Narsingh's statement in regard to the incident, and corroboration is necessary not only because Narsingh has given his evidence under a promise of pardon, but also because he is an interested witness. His half-brother Atma Singh (P. W. 84), with whom Narsingh is at enmity (so much so that Narsingh once fired a pistol at him), says that Balwant Singh used to help him in his disputes with Narsingh. The latter has therefore a

strong motive for giving evidence against Balwant Singh.

Even if the evidence be true it proves nothing against the appellants, as Narsingh's statement as to what Bhanga Singh told him would be no proof of what Balwant Singh and Jot Ram had said to Bhanga Singh. Even if we were to go further and assume that Balwant Singh and Jot Ram had given the undertaking which Bhanga Singh told Narsingh they had given, this would at the most be proof that they had abetted the murder of their own enemies, an offence with which they have not been charged. It would be no proof that they had entered into a conspiracy with Bhanga Singh to murder Bhanga Singh's enemies, and it is highly improbable that they would have entered into any such conspiracy as they were in no way interested in the feud between Bhanga Singh and his enemies. Narsingh then goes on to say that a few days later he and Bhanga Singh went to Mansa, where they met Jot Ram, who gave them a card (P-B) on which he drew a sketch to show the position of Fateh Muhammad's shop in Delhi, and who also gave them a letter to Fateh Muhammad. They then went to Delhi, where Narsingh bought a gun and Bhanga Singh a Mauser pistol at Fateh Muhammad's shop. Fateh Muhammad corroborates Narsingh in this matter and also says that they brought him a letter in which Jot Ram asked him to sell arms to them at low prices.

There is no very clear proof that the words written on the card P-B are in the handwriting of Jot Ram, and it is noteworthy that this document came into the hands of the police not from Narsingh, but from his half-brother Atma Singh, who accounts for his possession of it by saying that Narsingh had left it in a pocket when he gave his clothes to be washed, and that the woman who washed the clothes found it and gave it to Atma Singh's daughter. This explanation is not particularly satisfactory, and it seems strange that Atma Singh should have taken so much care to preserve the document, which was of no use to him, for nearly a year. The letter which Jot Ram is said to have given to Narsingh for Fateh Muhammad is not produced, although Fateh Muhammad says it was among his papers and was taken by the Deputy Superintendent



of Police. If this statement of Fattah Muhammad is true, it may be presumed that the letter, if it had been produced, would not have been favourable to the prosecution; and if the statement is false it would be unsafe to believe that Jot Ram gave any such letter.

But even supposing it to be true that Narsingh and Bhanga Singh went to Jot Ram and told him they wanted to buy arms, and asked him for a letter of introduction to Fateh Muhammad, and that he gave them a letter, they cannot by merely so doing be held guilty of abetting the crimes committed at Dina. Narsingh himself does not say that they told Jot Ram that arms were required for the murder of Bhanga Singh's enemies and it cannot be assumed without any evidence that he knew that the arms were required for such a purpose.

The third piece of evidence relied on by the prosecution relates to the purchase of two rifles, one by Bhanga Singh and the other by Balwant Singh from Fattah Muhammad in Delhi. It is alleged that Jot Ram, Balwant Singh and Bhanga Singh went together to Fateh Muhammad's shop and that Balwant Singh bought a rifle P 5 (afterwards produced by his mother) and Bhanga Singh a rifle P-2, which was found in the possession of Gajjan Singh when he was arrested. Narsingh and Fattah Muhammad have both deposed to this transaction which is said to have taken place on 29th or 30th July 1916 when Balwant Singh and Jot Ram were staying in Delhi at the Punjab Hindu Hotel, as shown by the hotel register. These witnesses have further deposed that after the rifles had been purchased Balwant Singh and Jot Ram said to Bhanga Singh that now that they had bought rifles for him he should do their business, to which Bhanga Singh replied that he would do his business first. The witnesses cannot however be believed on this point, as they made no mention of such conversation in their statements to the police, nor did Narsingh mention it in the statement which he made on the 27th June 1917 on being tendered a pardon. Had that conversation, which is the most important part of the evidence against Balwant Singh and Jot Ram, actually taken place, it is most improbable that Narsingh and Fateh Muhammad would have made no reference to it in their original statements.

With regard to their evidence as to the purchase of the rifles it is urged that Narsingh had no particular object in taking the journey to Delhi, and that it is remarkable that he should have arrived, as according to Fateh Muhammad he did, just at the moment when the transaction was taking place. It is also a point in favour of the appellants that Fateh Muhammad says that it was on 7th or 8th Ramzan that Balwant Singh Jot Ram and Bhanga Singh came to him. Those dates correspond to 8th and 9th July, whereas the dates of the appellants' stay in Delhi were 28th, 29th and 30th July as shown by the hotel register. On the other hand the hotel register shows that one Bhanga Singh, son of Kahan Singh, had come with Balwant Singh and Jot Ram and was occupying the same room. Although he is entered as a resident of Atla and a servant of Balwant Singh, the parentage agrees with that of the absconding Bhanga Singh of Dina. It is difficult to believe that this can have been a mere chance coincidence, and we agree with the learned Sessions Judge in thinking that the Bhanga Singh who was in the company of Balwant Singh and Jot Ram at Delhi was the Bhanga Singh of Dina. This fact makes it probable that the statements of Narsingh and Fateh Muhammad that the appellants and Bhanga Singh came together to Fateh Muhammad's shop and that the rifles P-2 and P-5 were bought at the same time, are true. The discrepancy in regard to the date may be due to want of recollection on the part of Fateh Muhammad.

But granting that the evidence as to the purchase of the rifles is true, this does not advance the case for the prosecution; what the prosecution have to prove is that the appellants intentionally aided the commission of the Dina murders and dacoities. How does their presence at the time of the purchase of the rifle P 2 by Bhanga Singh show that that they rendered such aid? Bhanga Singh bought the rifle himself and supplied the money, which he had got from Gajjan Singh (see the evidence of Gurdit Singh). He obtained no help from either of the appellants in the matter, nor did he need their help, as he had already been introduced to Fateh Muhammad and had bought a pistol from him at his previous visit with Narsingh in May. The Delhi transaction therefore



which is the one mainly relied upon by the prosecution, does not really prove anything against Balwant Singh and Jot Ram.

There is one other incident mentioned by Narsingh. He says that after the purchase of the rifles he went with Jot Ram, Balwant Singh and Bhanga Singh to Mansa, and thence with Balwant Singh and Bhanga Singh to Chukerian. They tried the rifles in Balwant Singh's garden, and Balwant Singh then asked Bhanga Singh to state clearly his intentions, and Bhanga Singh said he intended to kill Santa Singh and Banta Singh, upon which Balwant Singh said he would show him the house of his own enemies, and the two men went off together. On their return the witness went back to his village.

The statement of Narsingh on this matter, like his statement about the incident at Bhatinda, is uncorroborated and its truth is questionable, as it does not appear what object Narsingh had in going to Chukerian and why he should not have gone straight home from Delhi. But here again, assuming the statement to be true, how does it help the prosecution? It proves nothing against Jot Ram, who is not alleged to have been present on the occasion, and all that it could prove against Balwant Singh would be that he instigated the murder of some enemy of his own—an offence which is not the subject-matter of the present case. Not only does it not show that Balwant Singh had been abetting the murder of Bhanga Singh's enemies, but it would tend to exonerate him so far as that offence is concerned, as the very fact of his asking Bhanga Singh what his intentions were would suggest that up to that time he was unaware that Bhanga Singh intended to use the rifle for killing his (Bhanga Singh's) enemies.

The statements of Narsingh and Fateh Muhammad discussed above appear to be the only evidence against Balwant Singh and Jot Ram. The lower Court has referred to some other evidence of the dealings which Balwant Singh and Jot Ram have had with Fateh Muhammad. We do not doubt the existence of those dealings, but they do not help to establish the charges on which the appellants have been tried. The learned Sessions Judge has also referred to some evidence indicating a connexion between the appel-

lants and the dacoits. He says that the evidence of Mr. Donald (P. W. 61) and of Major Tara Chand, Inspector-General of Patiala Police, (P. W. 68) shows that Balwant Singh, when suspected by the Police of being connected with the dacoits, offered to assist in their arrest, and that it is curious that Jot Ram, who is a mere cloth merchant, should have volunteered to assist in the arrest of these dacoits, with whom he says he was not even acquainted. We do not however find from the evidence of Mr. Donald and Major Tara Chand that Jot Ram volunteered to assist in the arrest of the dacoits. Mr. Donald's evidence shows only that he tried to get Balwant Singh and Jot Ram to find out the dacoits, not that they made an offer to do so. In any case the fact that there may have been some connexion between the appellants and the dacoits would not serve to show that the appellants helped the dacoits to obtain arms for committing the murders and dacoities which are in question.

The learned Sessions Judge then refers to the fact that Balwant Singh produced a rifle P-102 before Major Tara Chand and stated that he had borrowed it from Bhanga Singh ostensibly for shikar purposes, but really to facilitate Bhanga Singh's arrest. That rifle had been bought by Balwant Singh from Fateh Muhammad, and the learned Judge remarks that the fact that a rifle brought by Balwant Singh from Fateh Muhammad had come into the hands of Bhanga Singh is strong evidence that Balwant Singh was providing arms for Bhanga Singh. But here he has wrongly assumed that Balwant Singh's statement to Major Tara Chand that he had borrowed the rifle from Bhanga Singh was true. Evidently that statement was not true. Balwant Singh seems to have falsely pretended that he had borrowed the rifle in order to account for his possession of it, not wanting to admit that the rifle was his and that he had brought it from Fateh Muhammad.

Towards the end of his judgment the learned Sessions Judge says that he thinks there is no doubt that the appellants knew for what purpose Bhanga Singh required arms. There does not however appear to us to be any evidence of such knowledge, apart from the uncorroborated statement of Narsingh in regard to the incident of Chukerian, and even



that statement (if believed) would show only that Balwant Singh came to know of Bhanga Singh's purpose after Bhanga Singh had bought the rifle.

There is a further difficulty in the way of the prosecution in this case, viz., in connexion with the question of jurisdiction. This question has arisen in two ways. It is argued, first, that Balwant Singh and Jot Ram were arrested in Patiala territory and that consequently they cannot be legally tried in a Court in British India; and second, that they cannot be tried in British India for anything which they are alleged to have said or done except in respect of the transaction at Delhi. We overrule the first contention. We agree with the finding that Jot Ram was arrested in Jullunder and Balwant Singh in a railway carriage at Bhatinda, and we also agree that the arrest of Balwant Singh by the British India Police was lawful as full and exclusive power and jurisdiction of every kind over the railway lines and over all persons within those lines had been ceded by the Patiala State to the British Government. As pointed out by the learned Sessions Judge in his order of 29th October 1917, this case is distinguishable from the case reported as *Muhammad Yusuf-ud-din v. Queen-Empress* (1), which relates to jurisdiction on the line of railway in the Hyderabad State as the cession by that State of jurisdiction along the line of railway was only for the purpose of enabling the British Government to deal with offences committed on the railway or connected with the administration of the railway, whereas the cession by the Patiala State was not of that limited character.

But the second contention put forward by the defence appears to be correct. With the exception of what took place at Delhi in July 1916, the alleged abetment consists entirely in what the appellants did or said at places in the Patiala State, and for offences of abetment committed in those places they cannot legally be tried in a Court in British India. *Reg. v. Pirtai* (2) is an authority on this point. *Emperor v. Chhotalal Babar* (3), which is cited on the other side, does

not apply, as that was a case in which the abetment was begun outside, but completed within British India. The present case is not one of that nature. The appellants could therefore be legally tried in the Ferozepore Court only in respect of what occurred at Fateh Muhammad's shop at Delhi in July 1916. The evidence in regard to that incident, as we have pointed out above, does not in any way establish the case for the prosecution.

The police were themselves perhaps conscious of the weakness of the case against Balwant Singh and Jot Ram, for although all the evidence against these appellants had been obtained by 2nd June 1917, when Fateh Muhammad made his statement, it was not till the end of August that Mr. Donald decided to arrest them, and the reason for arresting them then was, as he admits, that they did not seem to exert themselves to find Bhanga Singh and Ganda Singh which he had been trying to get them to do. Balwant Singh and Jot Ram may possibly have committed offences under the Arms Act, but it has not been proved that they abetted the murders and dacoities committed at Dina. We therefore accept their appeal, set aside the convictions and sentences, and acquit Balwant Singh and Jot Ram.

V.S./R.K.

Appeal accepted.

### A. I. R. 1919 Lahore 464

SCOTT-SMITH, J.

*Mt. Ram Kaur and others* — Defendants—Appellants.

v.

*Achhru and others* — Plaintiffs—Respondents.

Second Appeal No. 2250 of 1916, Decided on 17th April 1918, from decree of Dist. Judge, Jullundur, D/- 15th May 1916.

(a) Custom (Punjab) — Alienation — Ancestral property — Burden is on party alleging it to be ancestral property.

The burden of proving that a particular property is ancestral lies on the person who claims it as such, and the burden is not discharged by showing that it is not unlikely that the common ancestor acquired the property. [P 465 C 2]

(b) Custom (Punjab) — Alienation — Ancestral property—Presumption.

Where in 1851 three brothers were in joint possession of certain land:

Held: that it was not unreasonable to presume that they got the land from their father, but that it could not be presumed further that the latter got it from his father. [P 465 C 2]

(1) [1898] 25 Cal. 20=6 P.R. 1897 Cr.=24 I.A. 137 (P.C.).

(2) [1873] 10 B. H. C. R. 356.

(3) [1912] 36 Bom. 524=14 I.C. 970=13 Cr.L. J. 426.



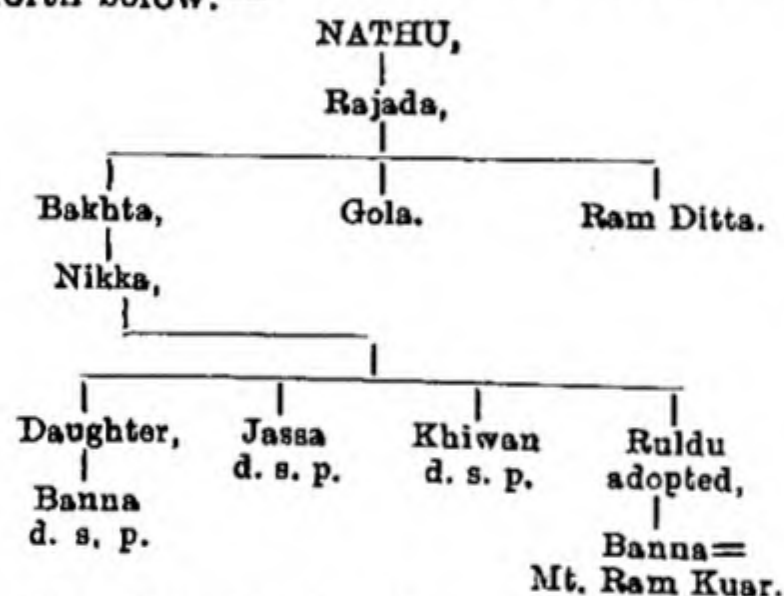
(c) Custom (Punjab)—Ancestral property—Reversion of property—Principle of applicability stated.

The principle of reversion to the heirs of a donor or appointor is limited to property over which he had not an unrestricted power of disposal, so that the reversionary heirs of an appointor cannot succeed to the land of the appointed heir on the latter's death without descendants, where the land is not ancestral *qua* themselves. [P 466 O 1]

*Sheo Narain*—for Appellants.

*Tek Chand*—for Respondents.

**Judgment.**—Civil Appeals Nos. 2250 and 2251 of 1916 may conveniently be disposed of together. The defendants-appellants in these two appeals are Mt. Ram Kaur and certain persons with whom she has made exchanges of certain plots of land of which she is in possession as the widow of Banna. The connexion between Banna and the plaintiffs-respondents appears from the pedigree-table set forth below:—



The first Court dismissed the suit, holding that it was not proved that the land was the ancestral property of the plaintiffs. The lower appellate Court on the other hand held that the land was proved to be the ancestral property of the plaintiffs, and that it was necessary to go into the question whether the exchanges were advantageous or not, as widows could not be trusted to manage the land in which they have a life-interest only. The Court accordingly accepted the appeal and gave plaintiffs the decree asked for. The defendants have come up to this Court on second appeal, and the first point urged on their behalf is that the land is not proved to be ancestral *qua* the plaintiffs. The lower appellate Court has disposed of the question whether the land is ancestral in rather a summary manner. The part of its judgment which concerns this point is as follows:

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"In my opinion the land is clearly ancestral. Theoretically the Courts demand strict proof of ancestral nature of land. Practically they are ordinarily satisfied with the absence of proof to the contrary."

In my opinion this view of the law is erroneous. Their Lordships of the Privy Council in the case reported as *Atar Singh v. Thakar Singh* (1) have laid it down in clear terms that

"The onus of proving that the property alienated was not self acquired in the hands of the last male owner was on the plaintiff who could not under the circumstances derive any assistance from conjectures, however reasonable, in place of positive proof."

This Court has enunciated the same rule in many judgments, two of which are reported as *Muhammad Umar v. Nawab Din* (2) and *Ala Singh v. Khark Singh* (3); in the latter it was laid down that the burden of proving that a particular property was ancestral lies on the person who claims it as such. The burden is not discharged by showing that it is not unlikely the common ancestor acquired it himself. In the first Settlement of 1851 the three sons of Nikka, Jassa, Khiwan and Ruldu, were in joint possession of all the land which subsequently came to Banna. In these circumstances it is not unreasonable to presume that they got the land from their father Nikka, but this presumption cannot be extended so as to hold that Nikka, acquired the land from his father Bakhta and that Bakhta acquired it from his father Rajada, who is common ancestor of Nikka and of the plaintiffs. The history of the village shows that persons of the Dhandora got along with the representatives of three other tribes purchased the whole of the village for Rs. 500 from the original proprietors. One of the Dhandoras was Nathu who had four sons, one of them being Rajada. Mr. Tek Chand on behalf of the respondents urges that there is no evidence to show that any of the land was acquired by purchase or gift and the presumption should be that it was either acquired by Nathu or broken up by his descendants out of the waste lands attached to the village. He asks me to presume therefore that the land must have come down from Nathu and his son Rajada. I am unable to draw this presumption. There is

(1) [1908] 35 Cal. 1039=42 P. R. 1910=6 I. O. 721=85 I. A. 206 (P. O.).

(2) A I R. 1914 Lah. 425=24 I. O. 678.

(3) [1912] 17 I. C. 392.



nothing to show how much land Nathu or his son Rajada broke up.

The land that Nathu cultivated may have descended to his sons other than Rajada and the land of which Rajada was in possession may have descended to Bhola and Ram Ditta, the ancestors of the plaintiffs, and the land which Nikka left may have been acquired in the first instance by him or by his father. There is certainly no presumption that Nikka's land came down to him from his grandfather. I therefore differ from the lower appellate Court and hold that the onus lay heavily upon the plaintiffs to prove that the land was their ancestral property, and that they have not discharged this onus. Prior to 1894 Banna was in possession of 2/3rds of the land left by Nikka and Kesar was in possession of the other 1/3rd. When Kesar died in 1894, mutation of his share was effected in favour of Banna who claimed to be an heir, on the ground that he was the adopted son of Ruldu. No one came forward to object to his claim and the land was duly mutated in his name. Mr. Sheo Narain cites *Bhagat Singh v. Sher Singh* (4) as authority for the proposition that the principle of reversion to the heirs of a donor or appointor is limited to property over which he had not an unrestricted power of disposal, and consequently they cannot succeed to the land of the appointed heir on the latter's death without a male descendant, where such land is not ancestral qua themselves. In accordance with this authority he urges that the land of Banna will not revert to the plaintiffs after the death of the widow and that consequently they cannot control her dealing with the property. Mr. Tek Chand does not dispute the authority of this ruling, but urges that the fact that Banna was allowed to succeed to Kesar's share shows that he must have been the formally adopted son of Ruldu and not merely an heir appointed according to custom. His argument is that Banna, being the formally adopted son of Ruldu, must be regarded just as if he were his natural son, and that this being so the plaintiffs are his heirs, whether the property was ancestral qua them or not. It was however never urged in the Courts below that Banna was anything more than an appointed heir of

Ruldu and I do not see how the point can be raised now for the first time.

The parties are Jats and governed by Customary Law, and there is no reason to suppose that Banna was anything more than an heir appointed according to usual custom. Art. 43 of Rattigan's Digest shows that the appointed heir does not acquire the right to succeed to the collateral relatives of the person who appoints him, where no formal adoption has taken place. But the exception under that article shows that among certain tribes an appointed heir does succeed collaterally. The mere fact that Banna was allowed to succeed to Kesar's share does not, in my opinion, show that he was the formally adopted son of Ruldu. Banna was in possession of the whole of Nikka's property as the appointed heir of Ruldu, the property was not ancestral qua the plaintiffs, and they have therefore no locus standi to control the alienations effected by Banna's widow. I accordingly accept the appeal and setting aside the orders of the lower appellate Court restore the order of the first Court dismissing the plaintiffs' suit with costs in all the Courts.

R.M./R.K.

*Appeal accepted.*

**\* A. I. R. 1919 Lahore 466**

SCOTT-SMITH AND BROADWAY, JJ.

*Sikandar and others—Appellants.*

v.

*Emperor—Opposite Party.*

Criminal Appeal No. 211 of 1918, Decided on 3rd October 1918, from order of Sess. Judge, Attock, D/- 26th February 1918.

(a) Penal Code (45 of 1860), Ss. 99(3), 148, 149 and 302—Rioting—Death caused in riot—Parties deliberately engaging in fight—Protection of police authorities not claimed—Right of private defence cannot be claimed—Members of each party are guilty of offence under S. 302.

There is no right of private defence where two parties arm themselves for a fight and deliberately engage in one. [P 469 C 2]

A dispute arose over the possession of a plot of land between two parties of villagers. After an altercation each party retired to their own well and armed themselves with spears, hatchets and dangs. One party then advanced to attack the other and the latter came out to meet the attack. In the fight which ensued, one man on each side was killed and others received injuries. The thana was only a mile away and each party had ample time to send word to the police and claim the protection of the police authorities, but neither of them did so.



*Held:* that the members of each party were guilty of offences under S. 302, Penal Code, inasmuch as the common object of each party was to cause injury and hurt to those they attacked and they must have known that the use of the formidable weapons they used would in every likelihood result in the causing of death.

[P 468 C 1, 2]

\* (b) Evidence Act (1 of 1872), S. 25—Report made to police is not admissible against person who made it.

A report made to the police which amounts to a confession is not admissible in evidence against the person who makes it. [P 469 C 1]

*Shuja-ud-Din*—for Appellants.

*C. Bevan Petman*—for the Crown.

**Judgment.**—The facts of the cases out of which this and Criminal Appeal No. 219 of 1918 have arisen are given in ample detail in the judgment of the learned Sessions Judge. It is therefore unnecessary to repeat them at length here. Briefly they are as follows: On 4th July 1917 a serious fight took place at Mauza Bhangi, some four miles from Hazro. The parties to this fight were Pathans of the said village, to the north of which there is some barani land regarding which there was a boundary dispute between, what may be termed, the parties of Shahzada and Sarwar, respectively. It is said that early in the morning of 4th July Shahzada together with Sher Bahadur and Hayat Khan attempted to plough up certain reeds growing along the boundary. They were prevented from so doing by Sikandar, Ayub, Shahbaz and Sarwar. An altercation ensued, but a fight was averted. Shahzada and his friends then retired to their well known as Sadhuwala, while Sarwar and his companions fell back on to their well known as Gobindawala. These two wells are some 65 karams apart, Sadhuwala well being some 30 karams away from the village abadi. It is said that, at these wells, each side was reinforced and weapons such as spears and hatchets were procured from the village. It soon got bruited about in the village that a fight was imminent and a crowd collected to witness it. At Sadhuwala well were Shahzada, Hajun, Sher Bahadur, Hayat Khan, Aziz Khan, Najim Khan and Shahinchi, while the party collected at Gobindawala well consisted of Sarwar, Sikandar, Shahbaz, Fazal Khan and Mawaz. Both sides are alleged to have been armed with spears, hatchets and dangs. As has been said above, the two wells are only 65 karams apart and it is easy to understand

that a certain amount of abuse must have been exchanged.

Finally, it is said that Sarwar led his men to the attack and made for Sadhuwala well. Shahzada and his following advanced to meet their opponents and the two sides met at a distance of some 8 karams from Sadhuwala well where the fight took place, in the course of which on Sarwar's side Sikandar, Shahbaz and Ayub received simple injuries while Sarwar himself was killed. The medical evidence shows that Sarwar, Sikandar and Shahbaz received injuries from spears or cutting weapons while Ayub received injuries caused by lathis. On the other side Shahzada was killed, having received injuries from spears and cutting weapons, while Shahinchi, Najim Khan and Hayat Khan also received hurts caused by lathis and cutting weapons as well as by spears. The injuries received by Shahinchi were grievous, as being dangerous to life, while Najim Khan's injuries were also serious though simple. Reports were made at the thana by both sides, that on behalf of Sarwar's party being made by Shahbaz and that on behalf of Shahzada's party being made by Shahinchi. The thana, it should be noted, is one mile from the scene of the occurrence. The police reached the spot and in due course sent up both sides for trial on charges under Ss. 302 and 148-149, I. P. C. The persons tried in the one case were Sikandar, Shahbaz, Ayub, Fazal Khan and Mawaz and in the other Hajun, Sher Bahadur, Hayat Khan, Aziz Khan, Najim Khan and Shahinchi. The learned Sessions Judge acquitted Mawaz, giving him the benefit of certain doubts that he entertained as to his having actually taken part in the fight, but convicted all the other persons in both cases, finding them guilty under Ss. 148 and 302, I. P. C., and sentencing them all to transportation for life.

Both sides have preferred appeals to this Court and we have heard Mr. Shuja-ud-Din for Sikandar and his party and Mr. Ram Lal for Hajun and his companions, while the learned Government Advocate has addressed us on behalf of the Crown. The trials were held separately, as was necessary, but as the two cases dealt with the same incident, the learned Sessions Judge has written one main judgment and this present judgment will dispose of both the appeals. The



case against the appellants in Criminal Appeal No. 211 of 1918 (Sikandar, etc.,) is that they were the aggressors and attacked the opposite party. It has been abundantly proved that the actual fight took place some 8 karams from Sadhuwala well, which shows conclusively that Sikandar and his party were the actual assailants and directly responsible for the fight. For them it was urged that the story for the Crown was incorrect, and that the truth was that Hayat Khan was seen cutting down the reeds early in the morning and was asked by Sikandar not to do so, that a quarrel ensued and the parties separated, Sikandar going back to his well and going about his ordinary avocations; that apparently the other faction had collected at Sadhuwala well and that by chance Sarwar happened to pass within a few paces of it whereupon he was attacked and killed, and that when Sikandar went to the spot he too was beaten. Those of the appellants in this case who received no injuries assert that they were not present. This story has been disbelieved by the learned Sessions Judge and we have no hesitation in holding that he has taken a correct view. The defence story is not supported by any evidence, and the report made by Shahbaz at the police station shows that it was Sikandar who is said to have passed by the well and to have been attacked, whereas the story now told is that Sarwar was the unfortunate victim.

Mr. Shuja-ud-Din took exception to the admissibility of this report on the ground that it was a statement made to the police by an accused person, and reliance was placed on *Harji v. Emperor* (1). This case however does not afford Mr. Shuja ud-Din any assistance, as the statement made by Shahbaz is not in the nature of a confession and therefore is not excluded by the Evidence Act or by the principles enunciated in the case cited. It was then urged that in a fight of this nature, when both sides, being equally armed, joined willingly in a fight, a conviction under S. 302, I. P. C., could not be legally passed. In this we are unable to agree. When a number of men armed with spears, hatchets and dangs deliberately attack another party similarly armed, the attackers, at least, cannot be considered to have any right of

self-defence. The common object of these appellants was clearly the causing of injury and hurt to those they attacked, and they must have known that the use of the formidable weapons they used would in every likelihood result in the causing of death.

We accordingly hold that Sikandar and his party have been rightly convicted of murder under S. 302/149, I. P. C. As to the individual appellants there can be no doubt at all that those persons who actually received injuries were in the fight, and, after a consideration of the evidence in the case, which has been very fully described and dealt with by the learned Sessions Judge, we see no reason to differ from his conclusions and hold that all the appellants in this case were concerned in the attack and have been rightly convicted. We accordingly dismiss their appeal.

The evidence in both cases consists of the same witnesses. There seems every reason to believe that the villagers, as well as the various persons concerned in the fight, had agreed to tell as little as possible of what they actually saw. As pointed out by the learned Sessions Judge the witnesses are clearly biased towards one side or the other, but their evidence leaves no doubt that all the persons named by them actually were present at the fight and took part in it. We agree with the learned Sessions Judge in thinking that P. W. Ghulam Muhammad Chaukidar is an independent witness, who has substantially spoken the truth. We therefore have no hesitation in holding that Hajun and his co-appellants were concerned in this fight and indeed as far as we understood him, Mr. Ram Lal did not seriously urge that any of his clients were not concerned in the affair. He contended, firstly, that the trial had been vitiated so far as his clients were concerned in that after one of the three assessors had given his opinion, the learned Sessions Judge addressed the remaining two assessors for the second time, and he cited *Nazimuddi v. Emperor* (2) as authority for his contention. What occurred is described by the learned Sessions Judge in his judgment, and it appears that the first assessor had clearly failed to understand the case, for he gave his opinion that the death of Sarwar had been caused at the

(1) [1918] 4 P. R. 1918 Cr.=19 Cr. L. J. 513=46 L. O. 273.

(2) [1912] 40 Cal. 163=15 I. O. 641=13 Cr. L. J. 497.



place where the reeds had been uprooted, a story that was not alleged by either side. The learned Sessions Judge points out that he had noticed that this particular assessor had been somewhat sleepy during the case and that in re-addressing the remaining assessors he carefully refrained from indicating to them what his own views were. We are unable to hold that the course adopted by him vitiated the trial.

It was next contended that the report made by Shahinchi was not admissible in evidence. Mr. Petman admitted quite correctly that this contention had force, inasmuch as the statement amounts to a confession. It should be noted here that although the learned Sessions Judge placed this, and the report made by Shahbaz, on the record, he specifically states in his judgment that he excluded them from consideration. Mr. Ram Lal then contended that his clients were entitled to an acquittal on the ground that all they did was to defend themselves. He pointed out that after the first quarrel at the place where the reeds were growing Shahzada and his companions fell back on to their own well Sadhuwala, thus avoiding a conflict. He contended that the statement of Allah Din should not be believed, but that in any event, even assuming that Allah Din spoke the truth when he stated that he saw three of this party coming from the village with spears, his clients were perfectly entitled to arm themselves so long as they used those arms only in defence of themselves. We can see no reason for doubting the correctness of Allah Din's story and there can be no doubt that Shahzada and his friends, after the affair at the reeds, took the precaution of procuring arms in order to meet eventualities.

Next it was urged that as the fight undoubtedly took place on lands belonging to the appellants, they were entitled to resist the attack. Emphasis was laid on the fact that on this side while Shahzada was killed Shahinchi and Najim Khan received very serious injuries, while, with the exception of Sarwar, the injuries received by his companions were slight in comparison. Mr. Ram Lal claimed that when the appellants saw the other party advancing towards them armed with spears and hatchets, they undoubtedly had a reasonable apprehension that grievous hurt at least would be caused, and that

therefore they were entitled, in exercise of their right of private defence, to go to the length of causing death. He urged that the law imposed no duty on the person assailed to continue to retreat indefinitely, and the fact that his clients went forward to meet the assailants for a few paces did not deprive them of the rights the law gave them. He referred to *Alingal Kunhinayan v. Emperor* (3). Doubtless this is correct but, as pointed out by Mr. Petman, Mr. Ram Lal lost sight of S. 99, I. P. C., Cl. 3 of which lays down that there is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities. This clause places an important restriction on the exercise of this right of private defence. There is no right of private defence where two parties arm themselves for a fight and deliberately engage in one.

In the present case it is clear that the appellants deliberately armed themselves and collected at Sadhuwala well, knowing full well that owing to what had already occurred at the reeds and also seeing that the opposite party had collected at a well only 65 karams away, a fracas was imminent. The police station was only a mile away, and thus they had ample time to send word to the police and claim the assistance of the public authorities. Instead of doing this they returned to the village, obtained arms and then re-assembled at Sadhuwala well, which is a clear indication of their eagerness for the fight, and in such circumstances we think that it does not really matter which party actually commenced hostilities. In this view we are supported by *Kabiruddin v. Emperor* (4), cited by the learned Government Advocate. We are of opinion that these appellants had no right of private defence and that they are therefore guilty of an offence under Ss. 302 and 149, I. P. C. The evidence on the record clearly shows that all the appellants were present at, and joined in, the fight. The fact that some of them were armed with spears and hatchets must have caused all of them to realize that death would in all probability be caused and they are therefore all equally guilty. We therefore maintain the convictions of all of these appellants.

(3) [1905] 28 Mad. 454=3 Cr. L. J. 49.

(4) [1909] 85 Cal. 868=7 Cr. L. J. 256.



It seems however that the appellants were in a lesser degree responsible for this fight and were it possible, we would inflict lesser punishments, but as they are clearly guilty under S. 302, I. P. C., we are unable to interfere. We accordingly dismiss both appeals. In view of the fact that the appellants in Criminal Appeal No. 219 of 1918 (Hajun and 5 others) were attacked at their own well and were not primarily responsible for the fight, we consider that their offence is less heinous and that they are deserving of lesser punishment. As we are however unable to award less than transportation for life, we forward the record to the Local Government for such action as may be deemed expedient, under S. 401, Criminal P. C.

R.M./R.K.

*Appeal dismissed.***A. I. R. 1919 Lahore 470**

CHEVIS AND MARTINEAU, JJ.

*Ramzan—Accused.*

v.

*Emperor—Opposite Party.*

Criminal Appeal No. 225 of 1918, Decided on 30th May 1918, from order of Sessions Judge, Dera Ghazi Khan, D/- 17th December 1917.

**Penal Code (45 of 1860), S. 84—'Unsoundness of mind' explained—Offence committed under impulse is exempt.**

Under S. 84, I. P. C., a person is exempt from criminal liability only if by reason of unsoundness of mind he is incapable of knowing the nature of the act done by him or that he is doing what is either wrong or contrary to law. It must in other words be shown that the cognitive faculties of the accused had been impaired by the unsoundness of his mind. [P 470 C 2]

**Judgment.**—Ramzan has been convicted of the murder of his wife, Mt. Zohran, and sentenced to transportation for life. He appeals. It is admitted that Ramzan killed his wife, inflicting six wounds with an axe. It appears that a neighbour named Gulu heard cries coming from Ramzan's house and on looking through a window saw Ramzan striking his wife with an axe. Information was sent to the Zaildar, who came to the spot and had the injured woman and the appellant sent to Kot Mithan, where Mt. Zohran died the next day from the injuries she had received. Before her death her statement was recorded in which she said that she had been massaging her husband's head, that she then spread his bedding for him, that she put a cooking pot on the fire and that she was talking to her

husband when he suddenly attacked her with an axe which was lying by him. She said that he had done this in a fit of insanity. The evidence of the Assistant Surgeon shows that the appellant exhibited no signs of insanity during the time in which he was kept under observation in the jail. There is however proof that he had been suffering from melancholia for four or five years, that he had been under the treatment of a Hakim named Muhammad Alam and got well, that he had a fresh attack two or three months before the occurrence and again went to Muhammad Alam for treatment and that he returned home about three days before the occurrence. Ramzan appears to have been on good terms with his wife and appears to have killed her under a sudden homicidal impulse without any sane motive.

Dealing with the question of law the learned Sessions Judge has held that the existence of such an impulse will not suffice to absolve the appellant from criminal liability, and that S. 84, I. P. C., will not apply to the case unless it is shown that the appellant's cognitive faculties had been impaired by the unsoundness of his mind. This is a correct view of law and is supported by *Queen-Empress v. Kader Nasyer Shah* (1), to which the lower Court has referred. Under S. 84, I. P. C., a person is exempt from criminal liability only if by reason of unsoundness of mind he is incapable of knowing the nature of the act done by him or that he is doing what is either wrong or contrary to law. In the present case, as the learned Sessions Judge has pointed out there is no evidence to show that Ramzan was subject to any delusions, or that when he attacked his wife he was ignorant of the nature of his act or did not know that he was doing what was wrong. On the contrary it appears that after the commission of the crime he asked pardon for what he had done. The case is therefore not covered by S. 84, I. P. C., and we hold that Ramzan has been rightly convicted of murder and we dismiss the appeal. But having regard to the fact that he was suffering from mental derangement, we direct that the record be forwarded to His Honour the Lieutenant-Governor with our recommendation that the case be dealt with by the Local Government

(1) [1896] 28 Cal. 604.



under S. 401, Criminal P. C., in such manner as it thinks fit.

R M./R.K. *Appeal dismissed.*

### A. I. R. 1919 Lahore 471

SCOTT-SMITH AND BROADWAY, JJ.

*Emperor*

v.

*Harnam Singh*—Accused.

Criminal Revn. No. 157 of 1918, Decided on 1st October 1918, reported by the Judge, Amritsar.

Criminal P. C. (1898), Ss. 345 and 439—Court of Revision has no power to allow composition of offence under S. 345.

The High Court sitting as a Court of Revision under S. 439, Criminal P. C. has no power to allow the composition of an offence under S. 345 of the Code. [P 472 C 1]

**Order.**—The question referred to this Court on the revision side by the Sessions Judge of Amritsar is whether an offence can be compounded by this Court in exercise of its powers of revision under S. 439, Criminal P. C. The authorities on the point are conflicting. In *Ram Piyari v. Emperor* (1) it was held by a Division Bench consisting of Knox and Karamat Hussain, JJ., that a High Court can, in the exercise of its powers of revision under S. 439, Criminal P. C., give leave for the composition of an offence under S. 325, I. P. C. In *Ram Chandra v. Emperor* (2) Knox, J., sitting by himself held that a High Court had no power to allow a case to be compounded in the exercise of its revisional jurisdiction. No reference was made by the Judge to the earlier decision. In Criminal Revision No. 63 of 1903 of this Court Chatterji, J., allowed a case to be compounded, though his judgment shows that he doubted whether he had power to do so. Similarly in the case reported as *Nidhan Singh v. King-Emperor* (3) the same Judge allowed the composition of an offence in revision, though again he expressed his doubt as to whether he had the power to do so. In Criminal Revision No. 788 of 1900 Maude, J., allowed an offence under S. 325, I. P. C., to be compounded, but he did not discuss the question whether this Court had the power to allow such a composition in the exercise of its revisional jurisdiction. In the case reported as *Adhar Chandra*

*Dey v. Subodh Chandra Ghosh* (4) it was held that the parties had no locus standi to ask the Judges sitting neither in the Court of Original Jurisdiction nor in the Court of Appeal to treat a compromise which they had made as one coming under S. 345, Criminal P. C. The matter was fully discussed in the case reported as *Sankar Rangayya v. Sankar Ramayya* (5), in which Ayling and Tyabji, JJ., held that an offence cannot be allowed to be compounded when the matter is before the High Court in revision, and that S. 345, Criminal P. C., is exhaustive of the circumstances and conditions under which a composition can be effected. Tyabji, J., after referring to the various sub-sections of S. 345, Criminal P. C., continued as follows:

“The section mentions the Court before which the prosecution is pending, to which the accused is committed for trial and before which an appeal is pending. There is no reference to the High Court in its revisional powers. Conversely it is note-worthy that S. 439 (which defines the powers and functions of the High Court in revision) does not refer to S. 345. It would therefore seem that if an offence were allowed to be compounded when the matter is pending before the High Court in revision, it could not be said that the composition was provided by S. 345, in two respects (1) as to the stage of the proceedings, (2) as to the Court which it is provided by the section, must give leave. It follows that the offence cannot now be compounded. It was argued before us that we are empowered (sitting in revision) to allow the composition to be made by reason of S. 423 (1) (d) read with S. 439 (1). For this argument it is contended that the giving of leave to compound is merely a consequential or incidental order, a contention that was accepted in *Ram Piyari v. Emperor* (1), but rejected in *Ram Chandra v. Emperor* (2), Knox, J., who decided the latter case sitting alone was a party to the earlier decision also but his attention was not drawn to it and he does not notice it.

In connexion with this argument I observe that the Code in no place specifically empowers any Court to give permission to compound; nowhere is there any special provision conferring distinct powers to sanction compositions. In S. 345 (2) the permission of the Court is referred to as a condition precedent to the act of the parties having any effect; and in S. 345 (5) the absence of such permission is mentioned as depriving the composition of any effect; but in each case it is assumed that the Court has power to give permission, provided there is any occasion for granting permission. The point of view from which the sub-sections are drafted is however that it is the injured person who has to be empowered to compromise and the difficulty in the way of compromise in revision is, in my opinion, not so much that the revision Court

(1) [1910] 82 All. 153=11 Or. L. J. 203=5 I. O. 696.

(2) [1915] 87 All. 127=16 Or. L. J. 247=28 I. O. 103.

(3) [1904] 67 P. L. R. 1904.

(4) [1915] 15 Or. L. J. 728=26 I. C. 176.

(5) [1916] 89 Mad. 604=16 Or. L. J. 750=31 I. O. 850.



has not been specifically authorized to grant permission, but that the parties are not allowed to compound except at the stages when the prosecution is pending, or the accused has been committed for trial, or an appeal is being heard from a conviction. The absence of any power being given to the injured person to compromise when matters are before the revision Court is fatal by reason of S. 345 (7)."

Ayling, J., concurred in these remarks. It will be seen that the Allahabad cases were considered and that the Judges were unable to agree with the dictum in *Ram Piyari v. Emperor* (1) that an order permitting composition can be treated as an incidental order within the meaning of Cl. (d), S. 422, Criminal P. C. We fully agree with the reasoning of the Judges in this Madras case and in accordance therewith we hold that this Court sitting as a Court of revision has no power to allow the composition of an offence. We therefore reject the petition for revision.

R.M./R.K.

*Revision rejected.*

### A. I. R. 1919 Lahore 472

SCOTT SMITH AND BROADWAY, JJ.

*Emperor*

v.

*Ralla Singh—Accused.*

Criminal Appeal No. 425 of 1918, Decided on 27th September 1918, from order of magistrate, 1st Class, Gujranwala, D/- 14th January 1918.

**Arms Act (1878), Ss. 4 and 19 — "Arms"**  
— Any instrument of attack or defence is an "arm."

The definition of the expression "arms" as given in the Arms Act is not, and is not intended to be exhaustive, and the true meaning of the term must be arrived at by consideration of the circumstances in each case.

Neither the length, breadth or the form of the blade of a weapon, nor the handle, afford any certain test of its classification as "arms." Whatever can be used as an instrument of attack or defence and is not an ordinary implement for domestic purposes falls within the purview of the Act. [P 472 C 2; P 473 C 1]

*C. Bevan Petman—for the Crown.*

**Judgment.**—The facts of the case out of which this appeal has arisen are as follows:—On the night of 21st/22nd April 1917, Ali Muhammad, Sub-Inspector of the Muridke Police Station, was patrolling with certain zaildars, lambardars and others. On nearing the Serai at Mouza Fattah Rehan certain persons were seen coming out of the Serai and running away. They were called upon to stop but instead of doing so increased their speed. They were pursued and two of

them were surrounded and put up a fight, calling out to one of their companions, Ralla Singh by name, to come to their assistance. This man returned with what appeared to be a dang in his hand. The Sub-Inspector thinking that the dang looked very like a chhavi called upon him to stop. Instead of doing so however he moved still nearer in the direction of the Sub-Inspector, who thereupon fired a pistol at him hitting him in the hands and thigh. Ralla Singh fell and was captured, when he was found to be in possession of what is described as a chhavi similar to a takwa, vide Ex. P. C. In due course Ralla Singh was tried for an offence under S. 457/511, I. P. C., in connexion with the breaking of a lock in a kothri of the Serai, and in the same trial was charged under S. 19, Indian Arms Act for possessing a chhavi without a license. The learned Magistrate convicted him of an offence under S. 457-511 I. P. C., and sentenced him to two years' rigorous imprisonment, including three months' solitary confinement. He held however that the weapon with which he was armed was not a chhiva as defined in *Gahna v. Emperor* (1) and was not an arm within the meaning of the Indian Arms Act, and therefore acquitted him on the charge under S. 19 of the said Act.

Against this acquittal the Local Government has preferred this appeal and the learned Government Advocate has urged that the instrument or weapon in respect of which the charge had been framed fell within the meaning of "arms" as defined in the Arms Act. Mr. Patman drew our attention to *Crown v. Santa Singh* (2), in which it was held, by a Division Bench of this Court, that the definition of the expression "arms" as given in the Arms Act was not, and was not intended to be, exhaustive and that the true meaning of the term must be arrived at by consideration of the circumstances in each case. This ruling was approved of in *Empress v. Kesar Singh* (3). In *Emperor v. Satish Chandra Roy* (4) it was held that neither the length, breadth or the form of the blade of a weapon, nor the handle, afford, any certain test of its

(1) A. I. R. 1914 Lah. 280=24 Ind. Cas. 594=15 Cr. L. J. 506.

(2) [1900] 16 P. R. 1900 Cr.

(3) [1900] 20 P. R. 1900 Cr.

(4) [1907] 34 Cal. 749=6 Cr. L. J. 227.



classification as "arms." Whatever can be used as an instrument of attack or defence, and is not an ordinary implement for domestic purposes, falls within the purview of the Act. With these decisions we agree.

There is on the record a full size sketch of the instrument which was undoubtedly found in possession of Ralla Singh when he was arrested after he had been wounded. This sketch shows that the instrument has handle 4 feet 8 inches long, and a head which is not the ordinary shape of a chhavi. This head weighs 1 seer and 2½ chhataks and is removable from its handle. The head or blade is similar in shape to an axe head downwards towards the handle ending in a somewhat blunt point. It is clear that it cannot be regarded as an ordinary axe head; nor have we even seen an axe with a handle of this length. There can be no doubt that this instrument can be used as a weapon of offence or defence and so far as we are aware it is not ordinarily used as an agricultural implement or for domestic purposes. As has been stated above, the definition of "arms" in the Arms Act is not exhaustive and it is immaterial whether it can be described as a chhavi or not. We have no hesitation in holding that the instrument in question falls within the meaning of the word "arms" as used in the Arms Act and renders its possessor amenable to the provisions of that Act. The circumstances in which it was found with Ralla Singh leave no doubt as to the object with which he had it. We accordingly accept this appeal and convict Ralla Singh, son of Mewa Singh, of an offence under S. 19, Arms Act and sentence him to two years' rigorous imprisonment.

R.M./R.K.

*Appeal accepted.*

### A. I. R. 1919 Lahore 473

SCOTT SMITH AND MARTINEAU, JJ.

*Emperor*

v.

*Muhammad Shah and another—Respondents.*

Criminal Appeal No. 118 of 1918, Decided on 13th July 1918, from order of Mag., First Class, Lyallpur, D/- 31st October 1917.

(a) Penal Code (45 of 1860), S. 415—Essential ingredients of cheating laid down—Damage or harm must be necessary consequence of deceit.

In order to constitute the offence defined in

the part 2 S. 415, I. P. C.: (1) there must be deception practised upon a person; (2) by that deception the person must be induced to do or omit to do something which he would not have done or omitted to do, had he not been so deceived; (3) such act or omission must cause, or be likely to cause, to the person deceived damage or harm in body, mind, reputation or property.

[P 474 C 1]

To constitute the offence of cheating under S. 415, I. P. C, the damage or harm caused or likely to be caused to the person deceived in mind, body, reputation or property must be the necessary consequence of the act done by reason of the deceit practised, or must be necessarily likely to follow therefrom.

[P 474 C 2]

(b) Penal Code (45 of 1860), S. 415—Recruits presented by accused rejected by Recruiting Officer—Accused offering recruits to M on payment of each recruit—Representation of same recruits—Recruiting Officer discovering rejection—Accused held not guilty of cheating.

The accused presented certain recruits before a recruiting officer, who rejected them. Subsequently the accused offered the same recruits to one M, on condition that the latter would pay Rs. 50 for each recruit. It was arranged however that the money would only be paid if the recruits were accepted by the recruiting officer. Before the recruiting officer it was discovered that the recruits had already been rejected:

*Held:* that there being only a possibility that M might suffer annoyance owing to the discovery that the recruits had already been rejected and to the fact that his explanation might not be believed at once by the recruiting officer, the accused were not guilty of cheating under S. 415, I. P. C.

[P 474 C 2]

*C. Bevan Petman*—for the Crown.

*Badraddin Qureshi*—for Respondents.

**Judgment.**—This is an appeal by the Local Government from the order of a First Class Magistrate acquitting Muhammad Shah and Babu Ram of the offence of cheating and of attempting to cheat under Ss. 417 and 420/511, I. P. C. The alleged facts of the case are as follows: Certain recruits were presented by Babu Ram before the Assistant Recruiting Officer at Lahore and were rejected by him as unfit. Muhammad Shah accused met another rejected recruit in the Lahore Bazar and took him to Babu Ram accused. Both of them then brought the rejected recruits to Lyallpur and offered them to Muhammad Kasim Lambardar on condition that he would pay Rs. 50 for each recruit. It was arranged that this money would only be paid if the recruits were accepted by the Recruiting Officer. At the same time Muhammad Kasim asked the accused whether the recruits had already been rejected or not, and they replied in the negative. Muhammad Kasim then presented the re-



cruits to the Assistant District Recruiting Officer, whose orderly Muhammad Shah told them that they had already been rejected in Lahore. When enquiries were made from the recruits themselves, they confirmed this and admitted that they had been rejected. Upon this the District recruiting officer made a report to the local authorities and the result was that the accused were chalaned under S. 420, I. P. C.

Admitting the facts to be as stated, the Magistrate was of opinion that the accused had committed no offence. It was conceded by the Public Prosecutor that there was no offence under S. 420/511, because the money was not to be paid by the Lambardar unless the recruits were accepted. It was however contended that the offence of cheating as defined in the part 2, S. 415, I. P. C., had been committed, because the act of the lambardar in presenting the rejected recruits to the recruiting officer was one likely to cause him damage or harm in his reputation. The Assisting District Recruiting Officer admitted in his statement that the lambardar was not liable to any punishment departmentally, as merely presenting rejected recruits is not by itself an offence unless it is done knowingly. As the lambardar did the act unknowingly he was safe from the wrath of the District authorities. The lower Court says: "hence that act did not cause him harm in body or property." It went on to say that if it did him any harm in reputation in the eyes of his fellow villagers, the harm was so slight that it would be covered by S. 95, I. P. C. It is not now contended by the learned Government Advocate that any offence under S. 420/511 has been committed, because Muhammad Kasim was only to pay Rs. 50 per recruit if the recruits were accepted. It is contended however that an offence has been committed such as is defined in the second part of S. 415, I. P. C. In order to constitute the offence there defined: (1) there must be deception practised upon a person; (2) by that deception the person must be induced to do or omit to do some thing which he would not have done or omitted to do, had he not been so deceived; (3) such act or omission must cause, or be likely to cause, to the person deceived damage or harm in body, mind, reputation or property.

Now assuming the facts to be as stated

the first and second ingredients of the offence exist in the present case. But the question is, as put by the learned Magistrate, whether the act of the lambardar in offering the rejected recruits caused, or was likely to cause to him damage or harm in body, mind, reputation or property. The learned Government Advocate does not say that this act would injure his reputation in the eyes of his fellow villagers. What he urges is that if the lambardar's explanation to the effect that he did not know that the recruits had been previously rejected had not been accepted, he would then have been reported to the Deputy Commissioner, who might have punished him departmentally. What actually happened was that Muhammad Kasim's explanation was accepted and no action was taken against him. Under the circumstances it cannot, in our opinion, be said that the lambardar's action in presenting the rejected recruits, seeing that he presented them not knowing that they had been previously rejected, was one likely to cause him any harm or injury at all. There was, in our opinion, only a possibility that he might suffer annoyance owing to the fact that his explanation was not at once accepted. The possibilities contemplated by the learned Government Advocate are, in our opinion, too remote. In *Mojey v. Queen Empress* (1) it was held that to constitute the offence of cheating under S. 415, I. P. C., the damage or harm caused or likely to be caused to the person deceived in mind, body, reputation or property must be the necessary consequence of the act done by reason of the deceit practised, or must be necessarily likely to follow therefrom. We are quite unable to hold that damage to Muhammad Kasim's reputation was the necessary consequence of his offering rejected recruits. There is no reason to assume that there was any likelihood that his explanation would be rejected and we see as a matter of fact that it was accepted. Under the circumstances we are unable to hold that there was any reasonable likelihood of Muhammad Kasim's suffering any damage or harm whatsoever from the fact that he innocently presented rejected recruits to the recruiting officer.

We therefore dismiss the appeal.

R.M./R.K. *Appeal dismissed.*

(1) [1890] 17 Cal. 606.



**A. I. R. 1919 Lahore 475 (1)**

SHAH DIN, J.

*Dewa Singh*—Petitioner.

v.

*Emperor*—Opposite Party.

Criminal Revn. No. 275 of 1918, Decided on 10th May 1918, from order of Sess. Judge, Gurdaspur, dated 14th February 1918.

Penal Code (45 of 1860), S. 225 (B)—Resistance to lawful arrest—Proof of overt act of resistance or obstruction is necessary.

In order to constitute an offence under S. 225B something more is required than an evasion of arrest or a mere assertion by the person sought to be arrested that he would not like to be arrested or that a fight would be the result of such arrest; there must be an overt act of resistance or obstruction. There must be positive evidence to show that officer armed with a warrant of arrest produced the warrant and that the person sought to be arrested resisted such arrest. [P 475 C 1, 2]

*Bishen Nath*—for Petitioner.*Lal Chand*—for the Crown.

**Judgment.**—The petitioner has been convicted of an offence under S. 225-B, I. P. C., and the sole question for decision in this revision is whether, upon the facts found, his conviction under the said section is justified. The learned Sessions Judge records the following findings against the petitioner:

"On 1st May 1917 the bailiff took the warrant and showed it to the accused, who, however, refused to accompany the bailiff to Court..... In my opinion the evidence sufficiently proves the defiant attitude assumed by Dewa Singh, who refused to accompany the bailiff, or give security for his due appearance."

In support of his view that the petitioner is guilty under S. 225-B, I. P. C., the learned Sessions Judge observes as follows:

"The warrant of arrest was to be executed under the provisions of S. 55, Criminal P. C. It was not necessary for the bailiff to use force, but Dewa Singh was bound to accompany him to the Court under the warrant, unless he were prepared to take the alternative of paying the decretal amount, for which he had made himself liable there and then."

Upon the above findings the petitioner is not guilty of an offence under S. 225 B, I. P. C., inasmuch as it is not found that he intentionally offered any resistance or illegal obstruction to the lawful apprehension of himself. In a recent decision reported as *Aijaz Husain v. Emperor* (1) *Sundar Lal J.*, held that, in order to constitute an offence under S. 225-B, I. P. C., something more is required than an evasion of arrest or a mere assertion by the

(1) [1916] 88 All. 506=35 I. O. 937=17 Cr. L. J. 419.

person sought to be arrested that he would not like to be arrested or that a fight would be the result of such arrest. There must be positive evidence to show that the officer armed with a warrant of arrest produced the warrant and that the person sought to be arrested resisted such arrest. In the Allahabad case the accused, on the warrant of arrest being shown to him, said to the officer who had come to arrest him: "Take me, if you can, to the Tahsil. I won't go." The High Court held that this act did not constitute an offence under S. 225B, I. P. C. Similarly, in the case of *Emperor v. Gajadhar* (2) it was held by Banerji J., that to justify a conviction under S. 225 B there must be an overt act of resistance or obstruction.

Following these authorities, I hold that the petitioner's conviction under S. 225B, I. P. C., is not justified, I accordingly accept this revision and setting aside the conviction and sentence, I acquit him.

R.M./R.K.

Petition accepted

(2) [1910] 11 Cr. L. J. 721=8 I. C. 828.

**A. I. R. 1919 Lahore 475 (2)**

Full Bench

SHAH DIN, CHEVIS AND LEROSSIGNOL, JJ.

*Akbar Hussain*—Plaintiff—Petitioner.

v.

*Karm Dad* and others—Defendants—Opposite Parties.

Civil Ref. No. 36 of 1917, Decided on 6th April 1918, by the Commissioner, Lahore.

Punjab Tenancy Act (16 of 1887), Ss. 14, 50 and 77 (3) (g)—Wrongful dispossession of tenant—Suit for possession and compensation is triable in Revenue Court—Limitation is one year from date of dispossession—Expiry of period without bringing suit in Revenue Court—Remedy in civil Court is barred. 64 P. R. 1898 Overruled.

A tenant who has been wrongfully dispossessed of his tenancy by his landlord can institute a suit for recovery of possession or for compensation or for both only in a Revenue Court under S. 77 (3) (g), Punjab Tenancy Act, and the period of limitation within which such a suit can be brought is, as laid down in S. 50 of the Act, one year from the date of his dispossession. If he allows that period to expire without bringing a suit in the Revenue Court, he loses his remedy altogether and is debarred from bringing a suit for recovery of possession or for compensation or for both in a civil Court. 64 P. R. 1898, Overruled. [P 479 C 1, 2; P 480 C 1, 2]

*C. L. Gulati*—for Opposite Parties.

**Chevis, J.**—(28th March 1918)—The facts of this case are as follows; The plaintiff is the tenant, the defendants are



the landlords. In May or June 1915 the defendants dispossessed the plaintiff, who sued to recover possession and obtained a decree on 8th May 1916. Later on, more than a year after his dispossession, he brought the present claim, which is one for compensation in the civil Court. The civil Court held that the suit was one falling under Ss. 14 and 77 (3) (n) of the Tenancy Act and returned the plaint for presentation to the Revenue Court. The Revenue Court dismissed the suit as barred by limitation, it having been brought after the expiry of the period of one year from the date of dispossession, see S. 50, Tenancy Act. The plaintiff appealed to the Collector, who remarked that the issue whether the case was cognizable by the Revenue Court had not been decided, and that the suit did not fall under S. 77 (3) (g), as it had not been brought within one year of dispossession as required by S. 50. So the Collector referred the case to the Chief Court through the Commissioner. In the first place I would note that the reference being under S. 100 of the Act, and not under S. 99, the Collector could have made the reference to this Court direct, and not through the Commissioner.

Next I would note that in my opinion the civil Court erred in holding that the suit was one falling under S. 14. This is not a suit for the payment for the use or occupation of land, but for compensation for dispossession. Further, though in certain cases it may be said that the person immediately entitled to the use and occupation of the land is the "landlord" with respect to the person occupying land without his consent, [vide *Ghuna Mal v. Jhanda Singh* (1)], I do not think that in a suit where the plaintiff is the tenant, and the landlord is the defendant we can possibly twist matters round so as to regard the claim as one by the landlord against mere trespassers. But the real question in this case is whether after the expiry of the one year within which a dispossessed tenant can bring a suit under S. 50 he can still bring a suit in the civil Court. His remedy in the Revenue Court is time-barred; what we have to decide is whether he has any other remedy left. According to *Imam Din v. Feros Khan* (2), he can still sue in the civil Court within the period of

limitation laid down by the Limitation Act (12 years in the case of a suit to recover possession of the land, 3 years in the case of a suit for compensation). If this be the correct view, then the civil Court was wrong in returning the plaint to the Revenue Court and the Revenue Court should have detected the error of the civil Court and should have followed the course laid down in *Kure v. Ghisa* (3), i. e., it should have made a reference to this Court under S. 99 with a view to obtaining a final decision on the question of jurisdiction. The plaintiff's remedy is obviously barred, so far as Revenue Courts are concerned, but if he still has a remedy open to him in the civil Courts, I do not think any Court should dismiss his claim as time barred; all that should be done is to refer him to the proper Court. In my opinion there can only be one period of limitation for any particular suit, and if it be correct law to say that for one year the Revenue Court has jurisdiction and after that jurisdiction is transferred to the civil Court, I would hold that the proper course for a Revenue Court, on finding that the case before it has been brought after the expiry of the one year, is to refuse to exercise jurisdiction, and not to decide the legal issue of limitation. If a Court never had jurisdiction or has ceased to have jurisdiction, I do not see how it can decide any issues.

Turning now to *Imam Din v. Feroz Khan* (2), I think the reasons there given for holding that after the year allowed by S. 50 for bringing a suit in the Revenue Court has expired the dispossessed tenant may still bring a suit in the civil Court, may briefly be said to be that a tenant is still regarded as a tenant for the period of one year from the date of his dispossession and no longer, and that after the expiry of the year the late tenant being no longer a tenant the suit cannot be regarded as a suit between tenant and landlord, and so the cognizance of the civil Courts is no longer excluded. The learned Judges quote from the opinion expressed by Sir Meredith Plowden in *Kesar Singh v. Nihal Singh* (4), viz :

"Ordinarily, then, a tenant is a person who has a right to hold, and does hold, and the person described in S. 50 is a tenant only by an exceptional use of the term tenant, and only, as it seems to me during the period prescribed for

(1) [1894] 82 P. R. 1894.

(2) [1898] 64 P. R. 1898.

(3) [1904] 63 P. R. 1904.

(4) [1891] 45 P. R. 1891 (F.B.).



bringing the special suit granted to him by S. 50, and for the purpose of exercising this right to sue."

So the right to sue in the civil Court after the expiry of the year is allowed on the ground that after the expiry of the year the claimant is no longer a tenant. It seems to me obvious that this line of argument cannot apply to the present suit, for the plaintiff before us has actually recovered possession of the land and was undoubtedly a tenant at the time when the present suit was instituted. If the tenant is to be regarded as still a tenant for the period of one year from the date of his dispossession then, since the plaintiff recovered possession within the year, he never ceased to be tenant, and the present suit must, in my opinion, be regarded as one between tenant and landlord. Thus the present case seems to me clearly distinguishable from the cases dealt with in the Full Bench ruling in *Kesar Singh v. Nihal Singh* (4) and in *Imam Din v. Feroz Khan* (2), and I would hold that the present suit being one between landlord and tenant the cognizance of the civil Courts is barred by S. 77 of the Act and the suit has rightly been entertained by the Revenue Court.

I regret however that I cannot express my assent to the proposition that a tenant is still to be regarded as a tenant for the space of one year and no more from the date of his dispossession, and that after the year mentioned in S. 50 a dispossessed tenant can still sue in the civil Court. I am aware that in writing this I am disagreeing with what has been held in a Bench ruling in *Imam Din v. Feroz Khan* (2), but at the same time I note that all that was then decided was that a suit brought after the year by an ex tenant who had not sued within the year allowed by S. 50 was not a suit falling under S. 77 (3) (i), Tenancy Act and was not cognizable by a Revenue Court. The Bench refrained from deciding whether a man who had lost his remedy in the Revenue Court had still a remedy left, viz., a right to sue in a civil Court. With all due respect I wish to express my opinion as to the position of a tenant who has been dispossessed.

Section 4 of the Act defines a tenant as a person who holds land under another, but the definition is subject to the reservation "unless there is something

repugnant in the subject or context." In S. 50 we read of tenants who have been dispossessed or ejected from their tenancy. It seems to me that in this section we must regard the word "tenant" as meaning a person who formerly held land under another, in other words an ex-tenant. Now why an ex-tenant should cease to be regarded as such at the end of one year I cannot understand. In my opinion the expiry of the year simply stops his right to bring a suit, but in no way changes his status; from the very date of his dispossession his status is simply that of a person formerly holding land who has been dispossessed, and I cannot see that this description became inapplicable to him after the expiry of the year. Sir Meredyth Plowden speaks of the tenant as being :

"regarded by the Act as continuing to hold the land of his tenancy after dispossession."

I should however prefer to say that, though the word "tenant" generally means a person holding land, the word as used in S. 50 merely means a person who formerly held it. The same learned Judge also refers to S. 51, of the Act, and reading it jointly with S. 50, is of opinion that the latter section gives a summary remedy to the dispossessed tenant instead of that given by S. 9 Specific Relief Act, but that if the ex-tenant does not avail himself of this remedy, he can still later on bring a regular suit in the civil Court. But in a suit to recover possession under S. 50 the plaintiff has to prove more than in a suit under S. 9 Specific Relief Act; it is not enough merely to prove dispossession he must also prove a right to recover possession, just as he would have to prove in a regular suit in the civil Court, and so I fail to see how S. 50 can be said to provide a "summary" remedy. Either S. 50 combined with S. 77 lays down the sole remedies open to a dispossessed tenant excluding the cognizance of the civil Courts, and laying down a period of limitation, or else it lays down a remedy excluding the cognizance of the civil Courts for one year only leaving it open to the plaintiff to sue in the civil Court after the expiry of that year. Now reading the Tenancy Act as a whole, that Act seems to me, when dealing with suits and applications, to mark off certain classes of suits and applications as cognizable only by Revenue Officers or Revenue Courts.



The cognizance of civil Courts in all such cases is jealously excluded, see Ss. 76 (1) and 77 (3) of the Act. Certain matters are to be dealt with by Revenue Officers, and no Court is to take cognizance of any dispute or matter with respect to which any such application or proceeding might be made or had. Certain suits are to be heard and determined by Revenue Courts, and no other Court is to take cognizance of any dispute or matter with respect to which any such suit might be instituted. Thus certain suits, including suits under S. 50, are carefully fenced off from the civil Courts. It seems to me most unlikely that in such circumstances the legislature could ever have contemplated that because S. 50 provides for institution of suits within one year, a suit which would otherwise have fallen under S. 50 should at the end of a year become entertainable by a civil Court.

What I think was intended by S. 50 was that the remedy was provided and the period of limitation also laid down. If a tenant is to get the full period of limitation allowed by the Limitation Act, what possible object can there be in giving jurisdiction to one class of Courts for the first year only and after that shifting the cognizance to another class of Courts? If the subject is one which is to be excluded from the cognizance of the civil Courts at all, why not keep jurisdiction with the Revenue Courts for the full period of limitation? If the Revenue Court is for any reason better fitted to deal with the case than the civil Court during the first year, what change occurs at the end of that year which renders it necessary or advisable to take away the jurisdiction of the Revenue Court and restore that of the civil Courts? Surely the question of jurisdiction should ordinarily depend on the nature of the suit, and not on the length of time that has elapsed since the cause of action arose. And to hold that after the first year cognizance changes from the Revenue to the civil Court means that the plaintiff is at liberty to choose his forum. This too can surely not have been intended. It appears to me that the legislature intended that certain classes of suits should be heard by Revenue Courts, presided over by officers who had training and experience of revenue matters; this intention would be entirely frustrated if simply by waiting for a year the plaintiff could bring his suit in a civil

Court presided over by an officer who had possibly never had any experience in all his service of revenue matters, thus evading the jurisdiction of the Revenue Courts presided over by revenue experts.

It may be argued that the legislature could not have intended thus to curtail the ordinary period of limitation in the case of dispossessed tenants. But there are similar provisions in other Tenancy Acts. The C. P. Tenancy Act allows only two years for a dispossessed tenant at-will to recover possession. The Bengal Tenancy Act allows the same period in the case of dispossessed occupancy raiyats. In *Ramdhan Bhadra v. Ramkumar Dey* (5) we read:

"It may seem somewhat remarkable that the legislature intended to curtail greatly to the disadvantage of 'the raiyat' the period of limitation from 12 years to two years . . . but what we have to do is simply to administer the law as we find it."

The same judgment also refers to the proceedings of the select committee to which the Bengal Tenancy Bill was referred for consideration, and from those proceedings it would appear that the C. P. Tenancy Act, was followed and limitation was intentionally cut down. Then turning to the N. W. P. Rent Act, we find a period of six months laid down within which a dispossessed tenant must apply to the revenue Courts for recovery of possession or for compensation for wrongful dispossession, the jurisdiction of the civil Courts being barred (see Ss. 95 and 96 of the Act). A case occurred in which a dispossessed tenant who had not applied to the Revenue Court within the prescribed period subsequently took forcible possession. On a suit by the landlords to eject him as a trespasser it was held that he had lost his right to plead his status as a tenant. See *Dalip Rai v. Deoki Rai* (6), upheld on appeal in *Dalip Rai v. Deoki Rai* (7). In these judgments it seems to have been taken as a matter beyond dispute that at the end of the six months the defendant had no remedy by suit in a civil Court. On p. 205 of 21 All. of the latter judgment we read:

"the position of the defendant when he obtained possession in 1895 was this. On the one hand he had clearly no remedy by legal proceedings. By virtue of the opening words of S. 95, Rent

(5) [1890] 17 Cal. 926.

(6) [1898] 20 All. 471.

(7) [1899] 21 All. 204.



Act, he never had any remedy in a civil Court. His only remedy in a Revenue Court namely an application under S. 95, (n) was barred by S. 96 (e)."

It is pointed out by Blair, J., in his judgment in *Dalip Rai v. 'Deoki Rai* (6) that to allow the defendant to plead his title as a tenant would be to allow him by his own

"laches to oust the jurisdiction of the Revenue Court and set up the jurisdiction of the civil Court in relation to a matter, which if the subject of contention, could have been brought only in the Revenue Court within a period of six months."

In conclusion I would express my indebtedness to the able commentary to be found on pp. 74 to 77 of the late Rai Bahadur Sukh Dyal's Punjab Tenancy Act, Edn 4. The learned commentator is of opinion that if Sir Meredyth Plowden's opinion be correct, there is nothing to prevent a tenant who has sued unsuccessfully within the year in the Revenue Court from bringing another suit after the expiry of the year in the civil Court. But whether a second suit would be barred by the law of *res judicata* is I think an arguable point. I would hold that such a suit as the present, whether brought within or after the year of limitation laid down in S. 50, falls under S. 77 (3) (g) and is cognizable only by the Revenue Courts, and that the present suit has rightly been entertained by the Revenue Court. I think the case should be returned to the Collector for decision of the appeal in due course.

**LeRossignol, J.**—(2nd April 1918).—I agree generally with what my learned brother Chevis has written. With all respect I hold that the attempt to establish an analogy between the provisions of S. 9, Specific Relief Act, and S. 50, Punjab Tenancy Act, fails. The period of limitation for a suit under S. 9, Specific Relief Act, is six months only, a period which in the opinion of many should suffer curtailment, and no appeal lies from a decree passed in such a suit. The period for a suit by an alleged improperly dispossessed tenant on the other hand is one whole year and the decree is subject to appeal and revision. There appears to me to be nothing common in the nature of the two suits. I agree with my learned brother that it is absurd to suppose that the legislature intended to give an ex-tenant a remedy in the Revenue Courts for one year and to permit him after the expiry of that

period to have recourse to the civil Courts. S. 77 (3) of the Tenancy Act, seems to me to be quite clear and imperative and to decide this question, we have no need to look outside it. It runs:

"The following suits shall be . . . heard and determined by Revenue Courts and no other and no other Court shall take cognizance of any dispute or matter with respect to which any such suit might be instituted."

In other words, if the evicted tenant has a remedy in the Revenue Courts and neglects to avail himself of that remedy, he shall have none in any other Court. S. 77 (3) (g) and (i) appear to me to cover all conceivable causes of litigation between a landlord and his tenant qua tenant. My conclusion is that an ex-tenant in that capacity can look for no relief outside the Revenue Courts and that the civil Courts can hear his plaint only if he sets forth a claim to relief in a capacity other than that of ex-tenant. I concur that the suit was correctly entertained and heard by the Revenue Court.

**Shah Din, J.**—(April 6, 1918).—The question involved in this reference is not free from difficulty, and there is much force in the reasoning employed by Sir Meredyth Plowden in his referring order in the Full Bench case reported as *Kesar Singh v. Nihal Singh* (4), in support of the opinion tentatively expressed by him that if a wrongfully dispossessed tenant does not sue in a Revenue Court for recovery of possession within the period of one year prescribed by S. 50 read with S. 77 (3) (g), Punjab Tenancy Act, he can still avail himself of his ordinary remedy in a civil Court and can bring a suit for recovery of possession within 12 years of the date of his dispossession (pp. 243 and 244 of the report). But regard being had to the general scheme of the Punjab Tenancy Act and to the policy underlying S. 77 of it, I think that it was the intention of the legislature to take away the jurisdiction of a civil Court in regard to a suit contemplated by S. 50 and S. 77 (3) (g) aforesaid and also to cut down the period of limitation which, had the dispossessed tenant been allowed to sue in a civil Court for recovery of possession of his tenancy or for compensation for wrongful ejection would have been available to him under the provisions of the Limitation Act. Any opinion even tentatively expressed by that eminent Judge, Sir Meredyth Plowden, is entitled to very great weight, but with all due deference



I find myself unable to subscribe to his view that the real object of S. 50 was

"to substitute a summary remedy to the wrongfully dispossessed tenant for recovery of possession instead of that given with a shorter period of limitation by S. 9, Specific Relief Act."

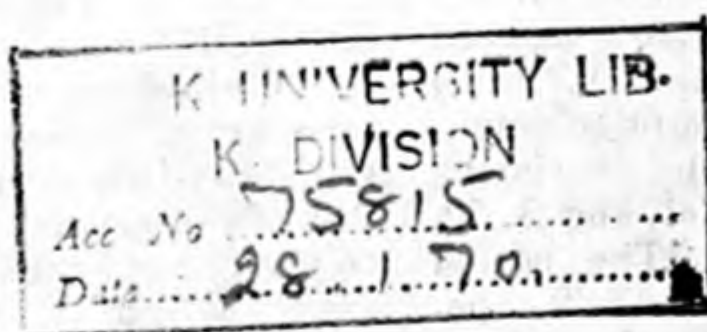
Section 51 of the Act expressly takes away, in the case of a dispossessed tenant, the remedy given by S. 9, Specific Relief Act; but it does not follow that because the summary remedy provided by S. 9, Specific Relief Act is so taken away by S. 51, the object of S. 50 is to substitute another "summary remedy" to the wrongfully dispossessed tenant with a longer period of limitation than would have been available to him under S. 9 aforesaid.

After a careful consideration of the provisions of Ss. 50, 51 and 77 (3) (g), Punjab Tenancy Act by the light of the general policy underlying them as regards the substitution of the jurisdiction of the Revenue Courts for that of the civil Courts in matters which fall peculiarly within the cognizance of the former. I am of opinion that a tenant who has been wrongfully dispossessed of his tenancy, in the circumstances mentioned in S. 50 of the Act, can institute a suit for recovery of possession or for compensation or for both only in a Revenue Court

under S. 77 (3) (g), and that the period of limitation within which such a suit can be brought is, as laid down in S. 50, one year from the date of his dispossession. If he allows the period of one year prescribed by S. 50 to expire without bringing a suit in the Revenue Court he loses his remedy altogether, and by the combined operation of S. 50 and S. 77 (3) (g) is debarred from bringing a suit for recovery of possession or for compensation or for both in a Civil Court. In other words, a Civil Court has no jurisdiction at all to hear and determine a suit instituted by a tenant who has been wrongfully dispossessed of his tenancy, and the sole remedy open to such tenant for recovery of possession or for compensation for wrongful dispossession or for both is a suit in a Revenue Court which he must institute within one year from the date of his ejection.

For the foregoing reasons my answer to the reference is that the plaintiffs suit was cognizable only by a Revenue Court, and not by a Civil Court and that the Revenue Court had full jurisdiction to hear and determine it. In my opinion *Ghuna Mal v. Jhanda Singh* (1) was wrongly decided and should be overruled.

R.M./R.K. Answer accordingly.



END



